Petition

81-1583

No. ——

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE MEAD CORPORATION, ET AL.,
Petitioners,

v.

ADAMS EXTRACT COMPANY, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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February 24, 1982

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QUESTIONS PRESENTED FOR REVIEW

1. This Court should grant the writ because the court of appeals, in dismissing the appeal as moot, sanctioned a procedure whereby a denial of a stay of a grand jury disclosure order improperly precludes appellate review on the merits, notwithstanding that this Court has specified that an immediate appeal on the merits should be available to implement the important policy of preserving the secrecy of grand jury proceedings under *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211 (1979). This Court should exercise its supervisory powers and provide appropriate and much needed guidance to the lower federal courts concerning the proper procedures to implement the standards for disclosure of grand jury transcripts. This raises an important question of federal law which has not yet been, but should now be, decided by this Court.

2. This Court should grant the writ because the court of appeals, by depriving petitioners of appellate review of the trial court's blatant failure to follow the mandate of *Douglas Oil* in its release of 135 grand jury transcripts for general discovery purposes, sanctioned a procedure that so far departed from accepted judicial practice that intervention by this Court is warranted.

3. This Court should grant the writ because the trial court ignored the carefully specified procedures set forth by this Court to govern the disclosure of grand jury transcripts. The trial court improperly ordered the wholesale disclosure to civil plaintiffs of grand jury testimony of 135 grand jury witnesses, without finding a particularized need for the disclosure of each of the 135 grand jury transcripts or undertaking an *in camera* inspection of any of the transcripts to determine whether any particularized need outweighed the public policy of maintaining grand jury secrecy.

LIST OF PARTIES

The party appearing as petitioner herein, as defendant-appellant before the United States Court of Appeals for the Fifth Circuit and as defendant before the district court is The Mead Corporation.[1]

The parties appearing as petitioners herein, as grand jury witness intervenors-appellants before the United States Court of Appeals for the Fifth Circuit and as grand jury witness intervenors before the district court are:

P. L. Barnum
J. A. Burlison
Robert Blasdell
W. R. Casey
Ronald D. Collums
J. A. Conboy
Kenneth Crafts
J. D. Crisp
Theodore Fajen
Robert M. Feldman
Carroll L. Fortenberry
Emil Ray Fougnie
Charles Franey
W. F. Fryburg, Jr.
Wilton Gates
Herbert H. Gershman

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[1] Pursuant to Rule 28.1 of the Rules of the Supreme Court, as amended, the following entities are subsidiaries and affiliates of petitioner, The Mead Corporation: Altonaer-Wellpappenfabrik G.m.b.H.; British Columbia Forest Products Ltd.; Brunswick Pulp & Paper Co.; Europapel, S.A.; Graficarton, S.A.; Georgia Kraft Company; Gulf Supply Latina; Harima M.I.D.; Kraft Land Services, Inc.; Northwood Forest Industries Ltd.; Northwood Panelboard Company; Packagemaster Limited; Schoeller Photo Papers, Inc.; Schoeller Technical Papers, Inc.; Schoeller Technical Papers; Seaboard Paper Company; Mead Chemicals, Inc.; Mead-Emballage, S.A.; Mead Imballagi, S.p.A.; Mead-Toppan Company, Ltd.; Mead Verpackung G.m.b.H.; and Mead Verpakking B.V.

Ira Ewing Halford
Jay Hayes
Ralph E. Honsberger
Alex B. Hopkins
J. R. Hurt
Thomas D. Johannson
John W. Josephson
William King
Richard Krebsbach
R. B. Krey
Joseph Kurpiel
Farrell L. Lapres
J. F. Leonard
Robert Edward Lindeman
L. E. Mackey
Ralph A. Michaels
C. W. Reese
Fred A. Rench
G. G. Sarno
Edward Serger
Robert Snell
Leroy W. Stalder
E. J. Svoboda
John Whitten
Ronald Yates

The parties appearing as plaintiffs-appellees before the United States Court of Appeals for the Fifth Circuit and as plaintiffs before the district court were:

Accurate Metal Weatherstrip Company, Inc.
Adams Extract Company
After Six, Inc.
Al Barker Publishing Co.
The Amberley Greeting Card Co.
Andre-Boudin Bakeries, Inc.
Arcadia Furniture Corp.
Atlas Container Co., Inc.
Austin Products Co.

Bateman Canning Co.
The Beaumont Co.
Bert Paley, Ltd.
Bodines, Inc.
Bookout & Mitchell Supply, Inc.
Bowman Dairy Company, Inc.
Burger King Corp.
Cantrell & Cochrane, Inc.
Carron Manufacturing Co., Inc.
Continental Nut Co.
Cook Distributing Co.
Cook Produce, Inc.
Co-Ordinated Industries, Inc.
Covington Fabrics Corp.
Dean Foods Co.
Dean Foods Products Company
Dean Milk Company, Inc.
Denver Meat Co.
District Hotel Supply, Inc.
Doranne of California d/b/a Embassy Giftwares
Douglas Furnture Corp.
Draper Canning Co., Inc.
Draper-King Cole, Inc.
Dulaney Foods, Inc.
Erie Seating Co.
Falstaff Brewing Company
Fox Deluxe Pizza Co.
Furniture Plastics, Inc.
Gandy's Dairies, Inc.
Gateway Farms, Inc.
General Brewing Co.
Golden Quality Ice Cream Co.
Grace Brewing Co.
Great Northern Packaging Corp.
Green Bay Foods
Griffin & Brand Sales Agency, Inc.
Grist Mill Co.
Haeger Potteries, Inc.
Huron Packaging Corp.

I. Kaplan, Inc.
Ilikon Corporation
International Frozen Foods, Inc.
Iowa Beef Processers, Inc.
ITT Continental Baking Co.
ITT Gwaltney, Inc.
Jefferson Orchards, Inc.
John Inglis Frozen Foods Co.
Keller Street Development Co.
Land O'Lakes, Inc.
Levee Furniture Co.
Liberty Dairy Company
Macomb Pottery Co., Inc.
Maier Brewing Co.
Marathon Enterprises, Inc.
Metro Molding Corporation
Mid-Valley Packing Co., Inc.
Mister B. Greeting Card Co., Inc.
Narragansett Brewing Company
Northland Aluminum Products, Inc.
Nutritional Food Products, Inc.
The Paniplus Co.
Pearl Brewing Company
Pearson Candy Co.
Penthouse Furniture Ltd.
The Pillsbury Co.
Poppin Fresh Pies, Inc.
Red Wing Industries, Inc.
Renown, Inc.
Rollins Container, Inc.
Rossville Packing Co., Inc.
S & P Company
Salsburg Meats, Inc.
Sambo's Restaurants, Inc.
Seneca Industries, Inc.
Shell-Tex Fisheries, Ltd.
Sky View Cooling Co.
Snyder-Craft Co., Inc.
Speas Co.

Steak and Ale Restaurants of America
Sunmark, Inc.
Tierra Royal Potteries, Inc.
Town House Furnture Ltd.
Trappe Frozen Foods Corp.
United Farmers Cooperative, Inc.
United Food Services, Inc.
United Foods, Inc.
Universal Cooperatives, Inc.
Valley Avocado Sales, Inc.
Valley Farms, Inc.
Valley Plastics, Inc.
Walters Brewing Company
West Publishing Co.
Westside Paper Co.
Williams Manufacturing Co.
Winona Industries
Winter Garden, Inc.
Wittek Golf Supply Co., Inc.

The parties appearing as defendants-appellants in the United States Court of Appeals for the Fifth Circuit and as defendants before the district court were:

Alton Box Board Company
Fibreboard Corporation
Georgia-Pacific Corporation
Packaging Corporation of America
Potlatch Corporation
Westvaco Corporation

Other defendants named in the original complaints in this litigation were:

Boise Cascade Corporation
Champion International, Inc.
The Chesapeake Corporation of Virginia
Consolidated Packaging Corporation
Container Corporation of America
The Continental Group, Inc.

Corco, Inc.
Diamond International Corporation
Dura-Containers, Inc.
Fibre Box Association
Fibreboard Corporation
Green Bay Packaging, Inc.
Hoener Waldorf Corporation
Inland Container Corporation
International Paper Company
Interstate Container Corporation
Longview Fibre Company
MacMillan Bloedel, Inc.
MacMillan Bloedel Containers, Inc.
Menasha Corporation
Olinkraft, Inc.
Owens-Illinois, Inc.
St. Joe Paper Company
St. Regis Paper Company
Southwest Forest Industries, Inc.
Stone Container Corporation
Union Camp Corporation
U.S. Corrugated Fibre-Box Company
Western Kraft East, Inc.
Weyerhaeuser Company
Willamette Industries

The parties appearing as other grand jury witness intervenors-appellants before the United States Court of Appeals for the Fifth Circuit and as grand jury witness intervenors before the district court were:

Messrs. A, B & C
Kenneth Adler
Donald Alexander
Douglas Allen
Anonymous I
Anonymous II
Anonymous III
Darold Beard

Larry Boten
Ray Caponi
Certain Continental Group Employees
Jack Collins
George L. Conner
Norris Cross
Jack Cummins
Lewis M. Cutter
Victor Donofrio
Philip Fleischacker
Charles D. Gray
Richard Hermann
King Johnson
Stanley Jones
W. E. Kemper
Art Luster
John J. Mannix
David E. Marshall
J. Judson Mealy
Edward P. Nairn
Paul Pace
Robert Pfohl
Quentin Porter
Raymond Remtema
James Rogier
Jerrold Ryan
Mr. S.
Max Williams
Witness "X"
John S. Young
Mr. Z

The parties appearing as individual criminal defendant intervenors-appellants before the United States Court of Appeals for the Fifth Circuit and as individual criminal defendant intervenors before the district court were:

James A. Braud
Allen W. Cassidy

Mark Cassidy
John L. Catlin
Ralph T. Crane
Richard Edmunds
Frank English
Peter J. Fluge
Numan H. Garrison
Frank L. Goetz
Byron J. Glaser
J. Robert Grayson
Frederick E. Huff
Charles C. Jackson
John D. Jackson
Joseph T. Kilcullen
Kevin McMorrow
J. W. Mesman
Lee F. Michael
Ralph R. Murchison
James K. Peterson
Francis E. Pratt
Baxter T. "Pete" Stewart
Clarke D. Thornton
Dean C. Treadway
William R. Winters

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RULE:

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No.

THE MEAD CORPORATION, ET AL.,
Petitioners,

v.

ADAMS EXTRACT COMPANY, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, The Mead Corporation ("Mead") and numerous grand jury witnesses,[1] respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit which dismissed, on mootness grounds, the appeal of the district court's orders requiring the wholesale disclosure for general discovery purposes of grand jury transcripts of 135 witnesses, the effect of which was to deprive petitioners of appellate review of orders which failed to follow *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211 (1979) (*"Douglas Oil"*) and *United States* v. *Procter & Gamble*, 356 U.S. 677 (1958) (*"Procter & Gamble"*).

OPINIONS BELOW

The judgment sought to be reviewed by this petition for writ of certiorari was entered pursuant to an opinion of

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[1] Petitioner Conboy is the respondent in another related pending appeal on which this Court granted certiorari on January 11, 1982. *Pillsbury Co.* v. *Conboy*, 50 U.S.L.W. 3547 (U.S. Jan. 11, 1982) (No. 81-825).

the Court of Appeals for the Fifth Circuit, published at 659 F.2d 1330, and is included in Appendix A. The Memorandum and Order of the United States District Court for the Southern District of Texas, dated January 25, 1980, compelling the wholesale disclosure of 135 grand jury transcripts, published at 1980-1 Trade Cas. ¶ 63, 192, and unpublished Pretrial Order No. 34, dated January 30, 1980, denying the Government's motion to quash the subpoena *duces tecum* which was the subject of the January 25, 1980 order, are included in Appendix B.

JURISDICTION

The Court of Appeals for the Fifth Circuit issued its opinion on October 29, 1981. Under Rule 40 of the Rules of Appellate Procedure, Mead timely filed a petition for rehearing before the Fifth Circuit on November 12, 1981. The Fifth Circuit denied Mead's petition for rehearing on November 27, 1981. The Fifth Circuit's order denying rehearing is included in Appendix C. This petition for certiorari was filed within 90 days thereafter. *See* Rule 20.4 of the Rules of this Court. Jurisdiction is invoked under 28 U.S.C. § 1254(1).

RULE INVOLVED

Rule 6(e) of the Federal Rules of Criminal Procedure governs disclosure of grand jury transcripts:

> (e) Recording and Disclosure of Proceedings.
>
> (1) Recording of Proceedings.—All proceedings, except when the grand jury is deliberating or voting, shall be recorded stenographically or by an electronic recording device. An unintentional failure of any recording to reproduce all or any portion of a proceeding shall not affect the validity of the prosecution. The recording or reporter's notes or any transcript prepared therefrom shall remain in the custody or control of the attorney for the government unless otherwise ordered by the court in a particular case.
>
> (2) General Rule of Secrecy.—A grand juror, an interpreter, a stenographer, an operator of a record-

ing device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

(3) Exceptions.

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to—

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.

(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize the grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made.

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding; or

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds

may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.

STATEMENT OF THE CASE

I. Preliminary Statement

On January 11, 1982, this Court granted the petition for a writ of certiorari to the Court of Appeals for the Seventh Circuit in *In re Corrugated Container Litigation, Appeal of Conboy*, 661 F.2d 1146 (7th Cir. 1981), *cert. granted sub nom. Pillsbury Co.* v. *Conboy*, 50 U.S.L.W. 3547 (U.S. Jan. 11, 1982) (No. 81-825), to review whether a non-party deponent in the *Corrugated Container* litigation had properly asserted the Fifth Amendment in response to questions taken verbatim from previously disclosed immunized testimony before a grand jury. Similar issues were presented in three other cases arising out of the *Corrugated Container* litigation: *In re Corrugated Container Antitrust Litigation, Appeal of Franey*, 620 F.2d 1086 (5th Cir. 1980), *cert. denied*, 449 U.S. 1102 (1981); *In re Corrugated Container Antitrust Litigation, Appeal of Fleischacker*, 644 F.2d 70 (3d Cir. 1981); and *In re Corrugated Container Antitrust Litigation, Appeal of Culy*, 662 F.2d 875 (D.C. Cir. 1981).

In none of those cases was the threshold issue of the propriety of disclosure of the grand jury testimony of the witnesses presented. In *Conboy*, the Seventh Circuit stated: "In this appeal, the parties do not state how these [grand jury] transcripts were made available to them [plaintiffs]." 661 F.2d at 1147 n.1. But, in the other three cases, the courts of appeals noted that the issue of disclosure of the grand jury testimony was the subject of a separate appeal before the Fifth Circuit. *Culy*, 662 F.2d at 878 n.3; *Fleischacker*, 644 F.2d at 73 n.3; *Franey*, 620 F.2d at 1089 n.2.

This petition for certiorari arises from that separate appeal. It results from the Fifth Circuit's decision on the threshold issue of disclosure of the grand jury transcripts involved in *Conboy*, *Culy*, *Fleischacker* and *Franey*, as well as the transcripts of approximately 130 other witnesses, which the district court ordered disclosed on a wholesale basis without following the standards established in *Douglas Oil* and *Procter & Gamble*.

Although petitioners made every attempt to obtain a stay of the district court's order of disclosure pending appellate review, such motions for stays were denied. The court of appeals now has dismissed the appeal as moot on the erroneous ground that "there is no further use to which these transcripts may be put under the order of the district court." 659 F.2d at 1332. Yet, in *Conboy*, which is pending before this Court on the Fifth Amendment issue, *Pillsbury seeks to use some of these very transcripts—namely, Conboy's—in its attempt to depose Conboy.*[2] Moreover, these grand jury transcripts can still be used in depositions and other proceedings in the *Corrugated Container* litigation in both the class action and opt-out cases.

In resolving the appeal concerning the disclosure of the grand jury transcripts of 135 witnesses, including Conboy's, on erroneous mootness grounds, the Fifth Circuit recognized that it was depriving Mead, grand jury witnesses, including Mead employees, and others of their right to appellate review of the disclosure order. The Fifth Circuit stated:

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[2] The instant petition for certiorari raises the threshold question by petitioner Conboy of whether the grand jury transcript of Conboy's testimony should have been disclosed to plaintiffs. If improper disclosure occurred, then this Court does not have to reach the question raised by Pillsbury in the pending appeal on which this court granted certiorari, *Pillsbury Co.* v. *Conboy*, 50 U.S.L.W. 3547 (U.S. Jan. 11, 1982) (No. 81-825), of whether Conboy could be compelled to answer the same questions verbatim from the grand jury transcript of Conboy.

> Because the district court's order was not stayed, and because the appeals are now moot, the defendants have been deprived of appellate review of these particular orders.

In re Corrugated Container Grand Jury, 659 F.2d 1330, 1332 (5th Cir. 1981).

In no other reported decision has a court of appeals so failed to review the merits of a grand jury transcript disclosure order. This petition for certiorari raises an important federal question because the effect of the Fifth Circuit's procedure totally undermines this Court's directives in *Douglas Oil* and *Procter & Gamble*. Appellate review on the merits of grand jury transcript disclosure orders could be avoided every time by the device of a denial of a stay. Yet, this Court has repeatedly permitted appeals of such disclosure orders so that the important interests of grand jury secrecy can be protected.

II. History of the Proceedings

Approximately 200 witnesses appeared before a federal grand jury sitting in Houston, Texas in 1976 and 1977 investigating the corrugated container industry. On January 25, 1978, two indictments were returned charging 14 corporate defendants and 26 individual defendants with a conspiracy to fix prices of corrugated containers in violation of the Sherman Act, 15 U.S.C. § 1.[3] Although Mead was named in the felony indictment, no employee of Mead was indicted. Mead and one other corporation, along with seven individuals, elected to go to trial and all were acquitted by the jury.

Civil class actions were filed making substantially the same allegations as the criminal cases and invoking the jurisdiction of the district court under 28 U.S.C. §§ 1331 and 1337. Throughout the proceedings, the district court faced repeated discovery motions by the plaintiffs seeking

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[3] *United States* v. *International Paper Co.*, Cr. No. H-78-11 (S.D. Tex. filed Jan. 25, 1978); *United States* v. *Boise Cascade Corp.*, Cr. No. H-78-12 (S.D. Tex. filed Jan. 25, 1978).

the disclosure of grand jury transcripts. During the criminal cases, the district court permitted limited access to certain grand jury transcripts for use in the defense of the criminal actions and prohibited the use of the transcripts in the civil cases in order to preserve grand jury secrecy.[4]

On four separate occasions, the civil plaintiffs sought production of grand jury transcripts. The district court denied plaintiffs' requests on three of those occasions. Production was ordered, however, on the fourth occasion, from which this petition arises.

Plaintiffs made their first attempt to obtain general discovery of grand jury transcripts in May 1979, arguing that certain interview transcripts were not grand jury transcripts protected by Rule 6(e) of the Federal Rules of Criminal Procedure and by the policy of grand jury secrecy. On June 4, 1979, the district court denied plaintiffs' discovery request, holding "that those transcripts fall under the protection of Rule 6(e)."[5]

In a second attempt, plaintiffs, pursuant to Rule 37 of the Federal Rules of Civil Procedure, moved to compel production of grand jury transcripts, arguing principally that access by some civil defendants to some grand jury transcripts during the criminal proceedings entitled them to discovery of these transcripts. The district court denied such discovery and refused to release the transcripts of those grand jury witnesses who objected to such disclosure, stating that "general discovery purposes are not sufficient to constitute compelling need."[6]

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[4] *United States* v. *International Paper Co.*, Cr. No. H-78-11, and *United States* v. *Boise Cascade Corp.*, Cr. No. H-78-12, Pretrial Orders Nos. 1, 2 and 5 (S.D. Tex. filed March 7, 1978, April 6, 1978 and July 28, 1978, respectively).

[5] *In re Corrugated Container Antitrust Litigation*, M.D.L. 310, Pretrial Order No. 15 (S.D. Tex. filed June 4, 1979), at 1.

[6] *In re Corrugated Container Antitrust Litigation*, M.D.L. 310, Memorandum and Order (S.D. Tex. filed July 26, 1979), at 3.

In their third attempt, plaintiffs, in September 1979, requested general discovery of the entire grand jury testimony of six persons based upon their invocation at depositions of their Fifth Amendment privilege against self-incrimination. On October 10, 1979, the district court again denied plaintiffs' discovery efforts.[7]

In plaintiffs' fourth attempt to obtain grand jury transcripts, plaintiffs served a subpoena *duces tecum* upon the Antitrust Division of the Department of Justice, a nonparty to the civil cases. Plaintiffs' subpoena *duces tecum* sought all grand jury transcripts of employees of the then eight nonsettling defendants, including petitioner Mead, as well as the transcripts of all witnesses who appeared before the grand jury who either named or referred in any way to any of the eight nonsettling defendants. The approximately 135 transcripts of grand jury witnesses which were ordered produced included the transcripts of the grand jury testimony of petitioners who were grand jury witnesses, including 14 employees of Mead. Petitioner Mead and the petitioner grand jury witnesses and others objected to the demand, as did the Department of Justice.

The district court, however, denied the motions to quash and on January 25, 1980 ordered the production of 135 grand jury transcripts to the class plaintiffs as well as to the plaintiffs in the opt-out cases. The district court said that its reason for disclosure boiled down to enabling "private plaintiffs to use fruits of the enormous investigative power of the federal government where they are trying to enforce the antitrust laws as 'private attorneys-general.'"[8]

The district court did not address the critical standard for production, *i.e.*, whether there was a particularized

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[7] *In re Corrugated Container Antitrust Litigation*, M.D.L. 310, Pretrial Order No. 27 (S.D. Tex. filed Oct. 10, 1979).

[8] *In re Corrugated Container Antitrust Litigation*, 1980-1 Trade Cas. ¶ 63,192, at 77,922 (S.D. Tex. 1980).

need for *each* of the 135 transcripts, nor did the district court examine *in camera* any of those transcripts. Nowhere did the district court make a finding that any of the transcripts were needed " 'to impeach a witness, to refresh his recollection, to test his credibility and the like' " as required by this Court's decisions in *Douglas Oil*, 441 U.S. at 222 n.12, and *Procter & Gamble*, 356 U.S. at 683.

On the same day as the January 25, 1980 order of disclosure, petitioners filed their notices of appeal and moved before the district court for a stay of its order pending the appeal, but the application was denied. On January 29, 1980, petitioners also moved before the court of appeals for a stay, but the Fifth Circuit denied the motion for stay without stating the reasons for its denial.

On January 30, 1980, petitioners applied to this Court for a stay pending appeal. On January 31, 1980, Mr. Justice Rehnquist granted the motion for a temporary stay, but lifted that stay on February 5, 1980. On the same day, petitioners submitted a letter to the Clerk of this Court requesting that Mr. Justice Brennan consider its application for stay. On February 6, 1980, Mr. Justice Brennan denied an interim stay, but referred the application to the full conference scheduled for February 15, 1980, which also denied the interim stay.[9]

On February 19, 1980, petitioners promptly filed with the Fifth Circuit a motion for an expedited hearing of their appeal and a motion for a stay of the district court's order in the interim. On the same day, petitioners also filed their brief on the merits to expedite the appeal. Nevertheless, the Fifth Circuit denied, without opinion, petitioners' application for an expedited appeal and for an interim stay.

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[9] *The Mead Corporation* v. *Adams Extract Co.*, No. A-644, 444 U.S. 1064 (February 19, 1980).

The Department of Justice then released the grand jury transcripts to the civil plaintiffs. The civil class action trial commenced on May 27, 1980. Portions of some of the disclosed grand jury transcripts were introduced in evidence at the trial. Mead was the only defendant, out of 37 originally named defendants, which did not settle prior to the jury verdict. The jury returned an adverse verdict to Mead on September 13, 1980. No judgment has yet been entered against Mead because plaintiffs failed to introduce evidence from which damages, if any, could be determined. After dismissing the jury, the district court re-opened the trial record and appointed a special master so that plaintiffs could attempt to cure their failure of proof. It is anticipated that no judgment will be entered for many months.

Under the district court's order, the class plaintiffs continue to have possession of the grand jury transcripts and can continue to use them in those proceedings, including in any retrial that might be ordered. Moreover, under the same order, the plaintiffs in the opt-out cases also have possession of those same transcripts and can continue to use them in depositions and other proceedings, including possible use at trial, which has not yet been scheduled.

After petitioners' motion for an expedited appeal was denied, the court of appeals did not issue its decision until more than 13 months after the jury rendered its verdict against Mead in the class case, notwithstanding that petitioners' appeal was filed 4 months before the trial commenced and the trial took nearly 4 additional months to go to the jury. The court of appeals dismissed the appeal, even though it recognized that petitioners, after pursuing all possible avenues to obtain a review on the merits, were nevertheless "deprived of appellate review." [10] Misconstruing the actual scope of disclosure of

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[10] *In re Corrugated Container Grand Jury*, 659 F.2d 1330, 1332 (5th Cir. 1981).

the grand jury transcripts, the court of appeals erroneously concluded that petitioners' appeal was moot when, in fact, it was not.

REASONS FOR GRANTING THE WRIT

I. Summary of Reasons

This petition raises an important federal procedural question which vitally concerns the effective administration of grand jury secrecy cases. This Court has previously set forth the standards the lower courts are to follow before disclosing grand jury transcripts. But, those standards are wholly undermined when, as here, a procedure is followed by the lower courts which results in no appellate review to assure that a district court has complied with the requirements established by this Court.

The court of appeals' decision not only deprived petitioners of appellate review on the merits, but demonstrates that appellate review procedures are inadequate to afford a party meaningful review in an area where such review is not only necessary, but indeed crucial to the secrecy of grand jury proceedings. Under present procedures, denial of a stay of disclosure of grand jury materials can result in a determination on the merits, a result clearly not intended by *Douglas Oil* and *Procter & Gamble.*

II. The Procedure Followed By the Lower Courts Undermines Effective Appellate Review of Grand Jury Disclosure Orders

The question presented by this petition is whether the lower courts should be permitted to follow a procedure which results in denial of appellate review to determine whether a district court's order disclosing grand jury transcripts is consistent with the requirements established by this Court.

This Court has long recognized the paramount importance of preserving the secrecy of grand jury proceedings. *Procter & Gamble*, 356 U.S. at 681-82. Without this

"indispensable secrecy," the efficacy of the grand jury as a public institution is threatened. *Douglas Oil*, 441 U.S. at 223-24.

In *Douglas Oil*, this Court reiterated the reasons for the need to preserve grand jury secrecy, stating that "[o]ne of the several interests promoted by grand jury secrecy is the protection of the innocent accused from disclosure of the accusations made against him before the grand jury." *Id.* at 218 n.8. This reason is particularly pertinent here since Mead, and the other defendants who went to trial in the criminal cases, were acquitted, and the other petitioners herein were not indicted. Continued grand jury secrecy, moreover, is needed not only because of the immediate impact upon a particular grand jury, "but also the possible effect upon the functioning of future grand juries." *Id.* at 222.

This Court has also recognized that in some limited situations "justice may demand that discrete portions of transcripts be made available for use in subsequent proceedings," *Douglas Oil*, 441 U.S. at 219-20, and consequently, has established stringent guidelines to be followed before the secrecy of grand jury proceedings can be breached. In *Procter & Gamble*, this Court held that secrecy "must not be broken except where there is a compelling necessity" and that such need "must be shown with particularity." 356 U.S. at 682.

But, these decisions become meaningless if the procedure followed by the lower courts is to deny motions for stays and then declare that the appeal is moot. A denial of a stay is obviously not a ruling on the merits. But, if such a procedure is permitted, this Court would be deprived of its jurisdiction to assure that the lower courts follow the requirements of *Douglas Oil* and *Procter & Gamble*.

In previous grand jury transcript cases, this Court has provided procedural guidance, such as is sought by this petition. *Douglas Oil*, 441 U.S. at 232 (concurring opin-

ion); *Procter & Gamble*, 356 U.S. at 685 (concurring opinion). The *Douglas Oil* court articulated "the better practice" that requests for disclosure of grand jury transcripts should be directed to the district court that supervised the grand jury's activities, even though such a procedure would not be "required in every case." 441 U.S. at 230-31. In the instant case, Judge John V. Singleton, Jr., presided as both the district court which supervised the grand jury as well as the civil cases.

Guidance is needed on the procedures necessary for assuring adequate appellate review of a trial court's application of grand jury disclosure standards. A writ of certiorari should be granted where, as here, appropriate procedures relating to the disclosure of grand jury transcripts have not yet been established. *Douglas Oil*, 441 U.S. at 229 n.18.

The opinion below demonstrates that the standards set forth by this Court in *Douglas Oil* and *Procter & Gamble* can be wholly ignored by the lower federal courts when coupled with a denial of a motion for a stay. The result here is that petitioners would be unable to obtain appellate review if this procedure is permitted. This Court would then be deprived of its jurisdiction to assure that its decisions were followed by the lower courts. This is especially serious and requires this Court's immediate attention since the crucial secrecy of the grand jury process is at stake.

III. The Decision of the Court of Appeals Is Inconsistent With Decisions of This Court and With Other Decisions in Its Own Circuit That Grant Immediate Appeal to Review the Merits of Grand Jury Disclosure Orders

The court of appeals recognized that it denied petitioners appellate review by dismissing the appeal as moot.[11] The court of appeals dismissed petitioners' appeal based on events over which petitioners had no control:

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[11] *In re Corrugated Container Grand Jury*, 659 F.2d 1330, 1331 (5th Cir. 1981).

(1) the denials of stays by the district court, the court of appeals and this Court; (2) the denial by the court of appeals of a motion for expedited appeal; (3) the production of grand jury transcripts by a third party, the Department of Justice; and (4) the purported completion of the jury trial in the class action litigation.[12] Petitioners pursued every available avenue to obtain appellate review of the district court's orders.[13] Yet, the court of appeals said that petitioners could not obtain appellate review.

Because of the importance of grand jury secrecy, the need for "an expeditious review" of a grand jury disclosure order has often been recognized. *Procter & Gamble*, 356 U.S. at 681. This Court has emphasized that judicial procedures must be fashioned so that appellate review is available on the merits of an order directing the disclosure of grand jury testimony. *Perlman* v. *United States*, 247 U.S. 7 (1918). To provide for review on the merits, this Court has authorized the immediate appeal of a trial court's order concerning the production of grand jury transcripts. The granting of immediate review is based on the realization that the denial of an immediate appeal may "render impossible any review whatsoever" of a disclosure order. *United States* v. *Ryan*, 402 U.S. 530, 533 (1971). In *In re Grand Jury Proceedings*, 528 F.2d 983, 984 (5th Cir. 1976), the Fifth Circuit also recognized the need for immediate appellate review "where denial of immediate review would render impossible" the review of a party's claims.

This Court has long voiced its objection to procedural rules which "practically defeat the right to any review

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[12] The trial is not completed since damages have not been determined; no judgment has yet been entered, nor will one be for many months.

[13] Since the Department of Justice, and not petitioners, were ordered to disclose the grand jury transcripts, petitioners did not have the contempt route available to obtain appellate review. *United States* v. *Ryan*, 402 U.S. 530, 532 (1971).

at all." *Cobbledick* v. *United States*, 309 U.S. 323, 324-25 (1940). It has emphasized that the merits of grand jury secrecy issues should be heard where a party makes the appropriate "effort to obtain appellate review." *Douglas Oil*, 441 U.S. at 233 (concurring opinion). In *Douglas Oil*, serious concern was expressed about "the availability to the losing party of a right to appeal an order" to disclose grand jury transcripts. *Id.* at 232 (concurring opinion).

The decision below does not abide by the teachings of *Douglas Oil*, *Procter & Gamble*, *Perlman*, *Ryan*, and *Cobbledick*, which authorize an immediate appeal expressly to provide meaningful appellate review on the merits of grand jury disclosure orders. While the court of appeals below purported to allow an appeal to be prosecuted from the disclosure order, it did not stay the disclosure order and did not expedite the appeal. By now dismissing the appeal as moot, petitioners are denied an appeal on the merits.

It is well established, however, that a court's decision on a stay application does not determine whether the subject matter under review "is right or wrong on the merits." *Russo* v. *Byrne*, 409 U.S. 1219, 1221 (1972). Certainly, when this Court denied petitioners' application for a stay, it cannot be said that it intended that decision to result in a denial of appellate review of the merits of the disclosure order. The decision of the court of appeals, however, would result in a decision on the merits. If permitted to stand, petitioners would be unable to obtain review of the disclosure order merely because of a denial of a stay.

The importance of appellate review on this appeal is demonstrated by the decision of the court of appeals on a separate appeal of a subsequent grand jury transcript disclosure order by the same district court in the *Corrugated Container* litigation. While the district court had refused to grant a stay of its January 25, 1980 order

requiring disclosure of 135 grand jury transcripts to class plaintiffs and opt-out plaintiffs, it granted a stay in the opt-out cases of its April 15, 1981 order directing the disclosure of additional transcripts of five other grand jury witnesses.[14] The Fifth Circuit also granted a stay and then reviewed the merits of the disclosure order. Significantly, the Fifth Circuit remanded the matter to the district court with instructions to follow the proper standards for grand jury disclosure. Specifically, the Fifth Circuit ordered:

1. Plaintiffs to move the district court to compel testimony of any deposition witness whose unavailable testimony plaintiffs still claim to need;

2. The parties, in connection with any motion to compel, to disclose to the district court all discovery information obtained since the entry of the disclosure order which they contend affects the need for the information withheld;

3. The district court to review *in camera* the transcript of the grand jury testimony of any witness whose testimony is sought to be compelled; and

4. The district court to balance, in light of all information discovered since the disclosure order, the need for disclosure of any grand jury transcript requested against the need for grand jury secrecy.

In re Corrugated Container Antitrust Litigation, Nos. 81-2187 & 81-2235 (5th Cir. Jan. 14, 1982).

In contrast, the district court, in its January 25, 1980 disclosure order which is the subject of this petition, failed to follow these four requirements. Prior to disclosure, the plaintiffs had not moved to compel testimony of the witnesses. There was no prior determination that any of the witnesses at issue had asserted the

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[14] *In re Corrugated Container Antitrust Litigation*, 1981-2 Trade Cas. ¶ 64,287 (S.D. Tex. 1981).

Fifth Amendment.[15] The district court made no evaluation of actual discovery obtained already by plaintiffs. The district court did not review the grand jury transcripts *in camera* before ordering disclosure. The district court did not make any findings of particularized need for each of the 135 grand jury transcripts. Nor did it weigh the continued need for grand jury secrecy. Yet, because the disclosure order was not stayed, there has been no review of the January 25, 1980 disclosure order.

The issue of grand jury secrecy is too important to be decided by a denial of a motion for a stay. The effect of the court of appeals' decision is to create a procedure whereby this Court's decisions on grand jury transcripts can be wholly ignored.

IV. Since the Issue of Grand Jury Secrecy Was Not Moot, Petitioners Should Not Have Been Denied Appellate Review

A. *The Denial of Appellate Review Was Based Upon an Erroneous Premise That the Grand Jury Transcripts Had Already Been Used to the Fullest Extent Possible*

Relying on class plaintiffs' representation that "[t]here can be no further dissemination" because the class action trial had concluded, the court of appeals erroneously held that "[b]ecause there is no further use to which these transcripts may be put under the order of the district court, these appeals are moot." *In re Corrugated Container Grand Jury*, 659 F.2d 1330, 1332 (5th Cir. 1981). The district court's orders, however, released the transcripts to not only class plaintiffs, but also to the opt-out plaintiffs in the *Corrugated Container* litigation, M.D.L. 310. They directed the Department of Justice to produce the transcripts "to counsel of record for plaintiffs herein" and authorized their use "for the prosecution of this liti-

[15] For example, at the time the grand jury transcripts of 14 Mead employees were ordered disclosed, not a single one of those employees had asserted the Fifth Amendment in a civil deposition.

gation." The case caption on the January 25, 1980 order states specifically that the order relates to "all actions" in M.D.L. 310, which includes both the class case and the opt-out cases. Furthermore, Pretrial Order No. 34, compelling the Government to produce the grand jury transcripts, applies "to all cases" in M.D.L. 310, including the opt-out cases.[16]

Thus, even if the class plaintiffs could not use the grand jury transcripts after the jury verdict in the class case, the fact is that the opt-out plaintiffs continue to use the same grand jury transcripts in depositions and will have the opportunity to try to introduce them at trial. There can be no doubt that a continuing interest exists in preventing further dissemination of these grand jury transcripts and in rectifying the damage which has already been done and which will continue to be done by the improper disclosure of the transcripts.

Indeed, in other related appeals, two circuit courts of appeals noted that the district court's orders disclosed the same grand jury transcripts to the opt-out plaintiffs who used them extensively in depositions taken in the opt-out cases. In *Pillsbury Co.* v. *Conboy*, No. 81-825, pending before this Court and involving the assertion of the Fifth Amendment by petitioner Conboy in response to questions asked before the grand jury, the Seventh Circuit stated:

> The opt-out plaintiffs subpoenaed several previously immunized grand jury witnesses, including Conboy, for deposition testimony. . . . At his deposition, Conboy initially testified as to the dates and general nature of his employment with Weyerhaeuser. He was then asked: to confirm that he had testified at the Justice Department interview and the

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[16] At the time these orders were entered, the district court issued orders as a matter of course applying both to class plaintiffs and opt-out plaintiffs, unless one or the other was expressly excluded. Not until April 8, 1980, in Pretrial Order No. 47, did the district court establish separate "practices and procedures" to govern solely the progress of the opt-out cases.

> grand jury; to identify as "true and correct" a transcript of his interview and of his grand jury testimony; and whether his responses at the interview and before the grand jury had been true and correct.
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> * * *
>
> The balance of the deposition consisted of questions previously asked at the Department of Justice interview. . . . The interrogation fell into the following pattern: *a question was asked from the transcript; then it was rephrased to include the transcript answer* (*i.e.*, "[i]s it not the fact that . . . ."); finally, Conboy would be asked if he had "so testified" in his interview statement.

In re Corrugated Container Antitrust Litigation, Appeal of Conboy, 661 F.2d 1145, 1147 & 1147-48 n.2 (7th Cir. 1981) (*en banc*), *cert. granted sub nom. Pillsbury Co.* v. *Conboy*, 50 U.S.L.W. 3547 (U.S. Jan. 11, 1982) (No. 81-825) (emphasis added; footnote omitted).

Indeed, if this Court were to determine that the grand jury transcript of petitioner Conboy was disclosed contrary to the standards established by this Court in *Douglas Oil* and *Procter & Gamble*, as presented by this petition for certiorari, the Court would never have to reach a decision as to whether Conboy properly asserted the Fifth Amendment in response to questions taken from his grand jury transcript in *Pillsbury Co.* v. *Conboy*, No. 81-825.

The District of Columbia Court of Appeals also found that the same grand jury transcripts were disclosed by the district court to the opt-out plaintiffs and used extensively during depositions taken in the opt-out litigation, stating:

> [A] number of opt-out cases remain pending . . . . In the course of discovery, opt-out plaintiffs (appellees) noticed the deposition of appellant . . . . At his deposition appellant, under advice of counsel, asserted his fifth amendment privilege . . . on the grounds that the answers to appellees' questions would tend to incriminate him. The questions appel-

> lant refused to answer were either taken verbatim from or closely tracked the transcript of the 1977 FBI interview submitted to the grand jury, *portions of which had been previously released to appellees.*
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> * * *
>
> *Nine pages of appellant's interview transcript that was submitted to the grand jury were released to the parties.*

In re Corrugated Container Antitrust Litigation, Appeal of Culy, 662 F.2d 875, 878 & 888 n.29 (D.C. Cir. 1981) (emphasis added).

Thus, the decision below is not only erroneous, but also directly conflicts with the findings of the Seventh and District of Columbia Circuits. Certiorari should be granted on this appeal to preserve uniformity among the circuits, especially since certiorari has already been granted on another appeal relating to the same grand jury transcripts at issue here.

Moreover, the grand jury transcripts remain in the possession of the class plaintiffs. No judgment has been entered in that case. Under the January 25, 1980 disclosure order, class plaintiffs can continue to use them in the class proceedings, including at a new trial if one should be ordered.

The error of the court below is "obvious" and "exceptional." *Graver Tank & Manufacturing Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949). This Court has previously granted certiorari where, as here, an erroneous decision forms the basis for a legal ruling which is unreasonable and plainly wrong, and represents a miscarriage of justice. *Thompson* v. *City of Louisville*, 362 U.S. 199 (1960); *Wilkerson* v. *McCarthy*, 336 U.S. 53 (1949). The proper supervision of the federal judiciary demands that the decision of the court of appeals be reviewed.

B. *The Court of Appeals Denied Appellate Review Even Though the Controversy Is Capable of Repetition and Yet Evaded Review*

It has been repeatedly recognized that an appeal concerning a controversy " 'capable of repetition, yet evading review' " is not moot. *SEC* v. *Sloan*, 436 U.S. 103, 108 (1978); *United States* v. *New York Telephone Co.*, 434 U.S. 159 (1977); *Roe* v. *Wade*, 410 U.S. 113 (1973); *Moore* v. *Ogilvie*, 394 U.S. 814 (1969); *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498 (1911). This Court has applied the foregoing criterion to a court order issued in connection with a trial which had been completed by the time the appeal reached this Court. *Nebraska Press Association* v. *Stuart*, 427 U.S. 539, 546-47 (1976). There, certiorari was granted to address the important issues raised by the lower court's order even though motions for stay and for expedited review had been previously denied.

Here, the controversy is likewise capable of repetition and yet evaded appellate review. The grand jury transcripts which are the subject of this petition are susceptible to further dissemination within the future course of M.D.L. 310; yet their disclosure evaded review. Since the class litigation is not over, the class plaintiffs under the district court's order can continue to use the transcripts in those proceedings. The opt-out plaintiffs also have possession of those transcripts under the same disclosure order involved in this petition and continue to use them in discovery and in the further prosecution of their cases at trial.

Moreover, the opt-out plaintiffs continue to seek disclosure of additional grand jury transcripts. As the district court noted in Pretrial Order No. 64, the issue of disclosure of additional grand jury transcripts is "arising on an almost daily basis in these cases." [17]

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[17] *In re Corrugated Container Antitrust Litigation*, 1981-2 Trade Cas. ¶ 64,287, at 74,302 (S.D. Tex. 1981).

Furthermore, the precise issue on this petition is capable of recurring and evading review in virtually every case where a court orders the production of grand jury transcripts since, as here, the disclosure will occur, if a motion for a stay is denied, before a resolution of the merits of the appeal.

The decision of the court of appeals denies petitioners review where grand jury transcripts were released in blatant violation of the standards set forth by this Court. In commenting favorably upon *Perlman* v. *United States*, 247 U.S. 7 (1918), Mr. Justice Frankfurter stated:

> Due regard for efficiency in litigation must not be carried so far as to deny all opportunity for the appeal contemplated by the statutes.

Cobbledick v. *United States*, 309 U.S. 323, 329 (1940). These words are particularly apropos when the important interests of grand jury secrecy are at stake. If the decision of the court of appeals on the issue of mootness is permitted to stand, its reasoning will prevent appellate review of grand jury disclosure orders except where a stay is granted, an appeal is expedited, or an appeal is heard before a trial on the merits concludes. This serious procedural flaw infects the majority of grand jury secrecy cases.

C. *The Court of Appeals Applied an Erroneous Standard of Mootness*

In deciding the issue of mootness, the court of appeals stated that the question to be answered was "whether the particular transcripts affected directly by the district court's order are susceptible of any further dissemination." *In re Corrugated Container Grand Jury*, 659 F.2d 1330, 1331 (5th Cir. 1981). By so framing the issue of mootness, the court of appeals precluded judicial review even though the controversy is still alive under accepted judicial practice and relief could still be granted to remedy the improper disclosure of the grand jury transcripts. Even if the grand jury transcripts were only in the

possession of class plaintiffs and not susceptible to further use, relief could be granted to prevent further disclosure and remedy the damage already done. But, as is obvious, the grand jury transcripts are also in the possession of opt-out plaintiffs which have used them and continue to use them. Indeed, in *Pillsbury Co.* v. *Conboy*, No. 81-825, pending before this Court, Pillsbury seeks to use Conboy's grand jury transcript in his deposition.

Petitioners can be afforded relief (and therefore the issue is not moot) by an order directing the return of the grand jury transcripts and the sealing of all public records created as a result of the disclosure of the transcripts; and by an order barring any further dissemination and use of the transcripts, including their use in preparing for and at a retrial, if any, in the civil class cases as well as in preparing for and at trial in the opt-out cases in the *Corrugated Container* litigation.

The standard applied by the court of appeals is inconsistent with the reasoning in *Dennis* v. *United States*, 384 U.S. 855 (1966). In *Dennis*, petitioners contended that the trial court committed reversible error by denying their motion for production of grand jury testimony of four government witnesses who testified against them at their criminal trials. Three of the original four witnesses at the trial testified at the second trial. The fourth witness (Mason) died in the interval between the trials. After ruling that petitioners were entitled to have examined the grand jury testimony of the four government witnesses and reversing the judgments of conviction and remanding for a new trial, this Court stated:

> Since the omission to require production of Mason's grand jury testimony with a view to impeachment can no longer be remedied, *his trial testimony, under our holding herein, is no longer available to the Government in the event petitioners are retried.*

Id. at 868 n.13 (emphasis added). Thus, in *Dennis*, the issue of grand jury secrecy was not moot with respect to

the testimony of a witness (Mason) who died because, even though the best remedy was no longer available, some relief could still be afforded to petitioners.

The decision below also directly conflicts with *FTC* v. *Gibson Products, Inc.*, 569 F.2d 900 (5th Cir. 1978), and *Atlantic Richfield Co.* v. *FTC*, 546 F.2d 646, 650 (5th Cir. 1977). In *Gibson Products*, the court of appeals emphasized that because "relief would be available by an order requiring the FTC to return the subpoenaed documents," the appeal as to the validity of the subpoena was not moot. *Id.* at 903. Likewise, in *Atlantic Richfield*, the court held that as long as "some relief" could still be afforded to protect confidential documents by an order "to require return of the subpoenaed documents" the appeal was not moot. *Id.* at 650. *See also FTC* v. *Browning*, 435 F.2d 96, 98 n.1 (D.C. Cir. 1970).

V. The District Court Failed to Follow the Decisions of This Court Mandating That the Secrecy of Grand Jury Proceedings Be Breached Only Upon a Compelling Showing of Particularized Need

A. *The District Court Utterly Failed to Follow the Standards Established by This Court for the Production of Grand Jury Testimony*

A party seeking the disclosure of grand jury testimony must demonstrate a compelling or particularized need that outweighs the necessity for maintaining the secrecy of the grand jury process. The district court, however, utterly failed to engage in such analysis under the criteria set forth by this Court. The district court did not make any requisite findings that the need for continued grand jury secrecy of each of the 135 transcripts had been eliminated. It failed to consider at all the interests promoted by grand jury secrecy to protect "the innocent accused from disclosure of the accusations made against him before the grand jury." *Douglas Oil*, 441 U.S. at 218 n.8.

It also failed to consider adequately the impact of a breach of grand jury secrecy on the future functioning of grand juries. In its order, the district court swept aside its obligation to examine the effect of wholesale disclosure on future grand juries.[18] The district court's offhand treatment of this issue ignores this Court's mandate in *Douglas Oil*, where this Court left no doubt that a court is required to protect the future efficacy of the grand jury process. *Id.* at 222. The decision below undermines the institution of the grand jury.

B. *The District Court Failed to Make the Requisite Findings of Particularized Need for Each of the 135 Grand Jury Transcripts Nor Did It Review the Transcripts In Camera*

The district court made no findings that any of the 135 transcripts were needed "to impeach a witness, to refresh his recollection, [or] to test his credibility" as contemplated by *Procter & Gamble* and *Douglas Oil*. Nor did the district court review, *in camera*, any of the 135 transcripts to determine what need, if any, there was for their disclosure.[19]

It is well established that civil plaintiffs are not entitled to grand jury transcripts for general discovery

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[18] *In re Corrugated Container Antitrust Litigation*, 1980-1 Trade Cas. ¶ 63,192, at 77,922 (S.D. Tex. 1980).

[19] The district court's failure to apply the proper standards for grand jury disclosure in the class action case is also demonstrated by its subsequent order granting disclosure to the opt-out plaintiffs of the grand jury transcripts of five additional grand jury witnesses. Again, the district court failed to make the requisite findings of particularized need for each grand jury transcript. On appeal from the opt-out disclosure order, the Fifth Circuit acknowledged the district court's failure by remanding the matter and directing the district court to review *in camera* the transcript of the grand jury testimony of any witness whose testimony is sought to be compelled and to balance the need for disclosure of any grand jury transcripts requested against the need for grand jury secrecy. *In re Corrugated Container Antitrust Litigation*, Nos. 81-2197 and 81-2235 (5th Cir. Jan. 14, 1982).

purposes. In *Procter & Gamble*, 356 U.S. at 683, this Court held that the general discovery needs of a party are insufficient to justify "wholesale" disclosure of grand jury testimony. The district court, however, admitted that its reason for disclosing the grand jury transcripts was to supplement civil plaintiffs' normal means of discovery.[20] The wholesale release of grand jury transcripts to promote plaintiffs' general discovery contravenes the policy of grand jury secrecy.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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[20] *In re Corrugated Container Antitrust Litigation*, 1980-1 Trade Cas. ¶ 63,192, at 77,922 (S.D. Tex. 1980).

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Appendix

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT *
UNIT A

No. 80-1093, 80-1103 and 80-1264

IN RE CORRUGATED CONTAINER GRAND JURY and CORRUGATED CONTAINER ANTI-TRUST CRIMINAL and CIVIL LITIGATION

ADAMS EXTRACT COMPANY, *et al.*,
Appellees,

v.

ALTON BOX BOARD COMPANY, *et al.*,
Defendants-Appellants,

KENNETH ADLER, *et al.*,
Intervenors-Appellants,

JAMES A. BRAUD, *et al.*,
Defendants-Intervenors-Appellants.

IN RE CORRUGATED CONTAINER ANTITRUST LITIGATION

ADAMS EXTRACT CO., *et al.*,
Plaintiffs-Appellees,

CFS CONTINENTAL, INC., *et al.*, TOWNHOUSE FURNITURE, *et al.*, ROSSVILLE PACKING CO., *et al.*, DENVER MEAT CO., *et al.*, CARRON MANUFACTURING CO., ANDRE-BOUDIN BAKERIES, INC., ILIKON CORP., GREAT NORTHERN PACKAGING CORP., *et al.*,
Plaintiffs-Appellants-Appellees,

PLEASURE HOURS, INC., *et al.*, LONDON DRY LTD., *et al.*,
Plaintiffs-Objectors-Appellants-Appellees,

v.

THE CHESAPEAKE CORPORATION OF VIRGINIA, *et al.*,
STONE CONTAINER CORP.,
Defendants-Appellants-Appellees.

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* Former Fifth Circuit case, Section 9(1) of Public Law 96-452—October 14, 1980.

IN RE CORRUGATED CONTAINER ANTITRUST LITIGATION

ADAMS EXTRACT CO., *et al.*,
Plaintiffs-Appellees,

v.

ALTON BOX BOARD COMPANY, *et al.*,
Defendants-Appellants,

JAMES A. BRAUD, *et al.*, MESSRS. A, B and C, *et al.*,
Intervenors-Appellants.

Oct. 29, 1981

Appeals from the United States District Court
for the Southern District of Texas

Before CHARLES CLARK, TATE, and WILLIAMS, Circuit Judges.

PER CURIAM:

These consolidated appeals challenge orders of the district court requiring the Department of Justice to turn over to the plaintiffs in this civil action transcripts of testimony given before a grand jury. Because we find that the appeals are moot, we vacate the judgment of the district court and dismiss the appeals.

The background of this multidistrict class action having been explained in prior opinions,[1] we recite here only those events necessary to the understanding of this appeal. During the years 1975-1977, a federal grand jury was convened in Houston, Texas, to investigate the corrugated container industry. The grand jury heard the testimony of approximately two hundred witnesses. In 1978, the grand jury returned two indictments charging eleven corporate and twenty-six individual defendants with violations of the Sherman Act. Some of these defendants pleaded nolo contendere to the charges, the others went to trial and were acquitted in early 1979. Thereafter, the plaintiffs sought release of the grand jury transcripts to assist them in their discovery. Three of these attempts were unsuccessful. In January 1980, the plaintiffs made their fourth attempt to secure general discovery of the transcripts by means of a subpoena *duces tecum* served upon the Department of Justice. In a Memorandum Order dated January 25, 1980, the district court granted, in large part, the plaintiffs' request to discover the grand jury transcripts. The district court ordered that certain of the transcripts be produced, and that "These transcripts shall be disclosed only to counsel of record for plaintiffs herein and their clerical personnel, and shall be used only for the prosecution of this litigation. The transcripts and interview statements ordered disclosed may be used in depositions and at trial for the purposes of impeaching witnesses, refreshing their memory, testing their credibility and the like. Use of portions of these transcripts as substantive evidence in the civil trial will be subject to later evidentiary rulings by the Court."

The appellants attempted unsuccessfully to get a stay of the district court's order from this court and from

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[1] *E.g., In re Corrugated Container Antitrust Litigation*, 643 F.2d 195 (5th Cir. 1981); *In re Corrugated Container Litigation*, 620 F.2d 1086 (5th Cir. 1980).

the Supreme Court. The Department of Justice released the transcripts to the plaintiffs in February 1980.

As it turned out, the only litigation actually conducted by the plaintiffs involved in this request, that is, the members of the class certified by the district court, was the trial against the only defendant who did not settle with the class, the Mead Corporation.

The grand jury witnesses who have intervened and appealed raise no arguments in their brief regarding mootness. The settling defendants who have appealed argue that the order of the district court releasing the transcripts will affect the status of yet undisclosed transcripts. The question to be answered to determine whether these appeals are moot, however, is whether the particular transcripts affected directly by the district court's order are susceptible of any further dissemination. "Implementation of mootness principles requires a highly individualistic, and usually intuitive, appraisal of the facts of each case." Wright, Miller & Cooper, Federal Practice and Procedure Jurisdiction § 3533. At the time the defendants filed their brief, they represented that further publication of the transcript was still possible. Now, the plaintiffs represent that these transcripts were used at the class trial against Mead Corporation in 1980. The plaintiffs' brief states: "There can be no further dissemination of the transcripts, because the district court restricted access to the transcripts to the attorneys and their office personnel and limited use of the transcripts to the furtherance of plaintiffs' case at trial. The transcripts have now been utilized to the fullest extent allowed by Judge Singleton's order, and any interest of the appellants which may have existed are fully protected by the highly restrictive order of the district court." Indeed, the defendants admit in a subsequent letter-brief that the appeals are moot as to the portions of the transcripts which were made public during the trial. The defendants' main concern is that the

order of the district court will affect future determinations about the release of other grand jury transcripts.

Because the district court's order was not stayed, and because the appeals are now moot, the defendants have been deprived of appellate review of these particular orders. Correspondingly, the plaintiffs' argument that our denial of a stay either affirmed the district court's decision or impliedly approved that decision on the merits exhibits a fundamental misunderstanding of the effect of a denial of a stay. *See Beverly v. United States*, 468 F.2d 732, 740 n.13 (5th Cir. 1972).

In a subsequent letter regarding the issue of mootness, the plaintiffs argue that they have a continuing interest in retention of the grand jury transcripts but that the defendants do not have an interest in the return of the transcripts. The plaintiffs note that "vacation of the order at issue might compel appellees to return the transcripts . . . ." The defendants respond that if the plaintiffs have a continuing interest, so do they, and that the appeals cannot be moot. This "continuing interest" controversy is speculative. The plaintiffs claim their interest would arise in the event that the multidistrict action is retried. Such a contingent future interest cannot overcome our jurisdictional concern that there is no live controversy at stake now. The result of returning the transcripts which the plaintiffs perceive as undesirable is precisely the effect this opinion is intended to have. Because there is no further use to which these transcripts may be put under the order of the district court, these appeals are moot.

The order appealed from is vacated so that it will spawn no legal consequences. *Lebus v. Seafarers' International Union*, 398 F.2d 281 (5th Cir. 1968). The appeals are

DISMISSED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISRICT OF TEXAS HOUSTON DIVISION

M.D.L. No. 310

IN RE CORRUGATED CONTAINER ANTITRUST LITIGATION

This Document Relates to:

ALL ACTIONS

MEMORANDUM AND ORDER

Through a subpoena *duces tecum* issued to Larry Gustafson of the Antitrust Division, class plaintiffs again raise the question of their access to grand jury transcripts. The court has on three occasions denied related motions.[1] The request has now been severely reduced in scope and the circumstances surrounding the transcripts' use by third parties has been clarified by discovery; and, after careful consideration of the arguments advanced on this subject, the court is convinced that the current request should be granted, in large part.

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[1] Plaintiffs first sought access to all transcripts without showing compelling need, on the grounds that Rule 6, Fed. R. Crim. Proc., did not apply. We disagreed. They then sought the same transcripts on a showing of general discovery needs as weighed against only slight reasons still remaining for secrecy. As to those witnesses who objected that they still feared retaliation if their testimony was made known, the court also denied that request. Third, plaintiffs asserted that the invocation of his Fifth Amendment right not to incriminate himself constituted compelling need for a deposition witness's transcript. Again, the court denied the request.

Two types of transcripts are at issue here: testimony before the grand jury and interviews given to government attorneys and investigators under letter grants of immunity and promises of secrecy. The former are clearly subject to the provisions of Rule 6(e), Fed. R. Crim. Proc., and the latter perhaps should be so. Although there are some differences between the two types which may justify a lesser showing of need for discovery of interview transcripts, in this opinion the court will treat both types as falling fully within the provisions of Rule 6.

Class plaintiffs' request is considerably reduced in scope from previous requests. They now seek only transcripts relating to the eight defendant corporations who have not reached a settlement agreement with the class and against whom this litigation is set for trial in May of this year. Plaintiffs seek thirty-two transcripts of employees of the non-settling defendants; in addition they seek the portions of one hundred three other witnesses' transcripts which refer to the non-settling defendants. Mr. Gustafson of the Antitrust Division is unable as yet to state how many pages would be involved in this second section of the request, but clearly it would not be a very large percentage of the total pages of the hundred three transcripts involved.

In all the disputed ground of this question, two principles of law stand clear: it is committed to the trial judge's discretion to determine whether grand jury transcripts should be disclosed, *Allis-Chalmers Manufacturing Co. v. City of Fort Pierce, Florida*, 323 F.2d 233, 241 (5th Cir. 1963), and in making that determination he is to balance the needs for secrecy against the needs for disclosure, *Douglas Oil of California v. Petrol Stops Northwest*, 99 S.Ct. 1667, 1674-75 (1979). As the need for secrecy declines, so does the showing of need for disclosure necessary to prevail.

Where the grand jury has completed its deliberations and been discharged, and where any ensuing indictments have been tried to conclusion, the reasons for secrecy are to protect the witnesses from harmful effects of their testimony, to avoid chilling the willingness of future grand jury witnesses to testify openly, and to protect the names of the unindicted from any slurs that may have been cast upon them during the grand jury proceedings. As has been stated before, the court finds that in this litigation these factors weigh relatively lightly in the scale. Discovery on the exchange of grand jury transcripts and briefing and debriefing sessions by the corporate defendants and their agents makes it clear that in many witnesses' cases there remains no real secrecy from those who might retaliate against them—their employers and various competitors. Where a witness has voluntarily given his testimony, in transcript or summary form, to his employer (the most likely person to subject him to some ill effect of his frankness); and, further, where that information as to his testimony was many months ago shared among the corporate employers pursuant to a joint defense effort, it defies belief that he still fears harm from those entities. Many of the transcripts in question were interview transcripts, moreover; those witnesses were accompanied and represented in most cases by attorneys retained and paid by their employers. Defendants contend that work product and joint defense privileges attach to information they obtained from witnesses through briefing, debriefing, joint representation, and outright gift of a copy of the employee's transcript; but a witness's testimony or his summary of his testimony is not an attorney's work product, and the joint defense privilege merely maintains any privilege already attached to information shared among defendants. Where the information lost its secrecy by the fact of its being given to a defendant, it cannot recover it through that defendant's passing it on to others. This is probably not the case as to all the transcripts sought

here; defendants' answers to class plaintiffs' interrogatories concerning distribution of the transcripts are so vague and uninformative as to provide the court with very little guidance as to which transcripts have been acquired and/or exchanged by and among themselves, but do make it clear that such acquisitions and exchanges occurred. There may be some witnesses who legitimately fear some injury to their employment relations from the limited additional dissemination of their testimony this order requires. Apparently, there have been some examples of coercion and retaliation by employers in this industry in relation to the grand jury investigation. An employee who is penalized for giving testimony before a grand jury has a cause of action against his employer. In this district last year, a Mr. Phillips recovered $400,000 from Goodyear Tire and Rubber Company for wrongfully terminating his employment as a result of his testimony in an antitrust investigation, 76-H-1008. In any event, the information contained in the transcripts at issue here, if not the transcripts themselves, has already been available to the defendants for many months.

Defendants insist that the court cannot order disclosure of any of these transcripts because some future grand jury witness may be deterred from frankness by fear that his testimony may be made public; and that the fact that the corrugated grand jury witnesses cannot reasonably expect any very serious harm is irrelevant since some witness in another case might reasonably fear greater harm. This argument ignores the fact that the decision to disclose grand jury transcripts must be made for each case based on the facts of that case. In recent years, many courts have ordered disclosure of grand jury materials to private plaintiffs[2]; but this does not appear

[2] *Petrol Stops Northwest v. United States*, 571 F.2d 1127 (9th Cir. 1978), *rev'd. on other grounds*, 99 S.Ct. 1667 (1979); *Illinois v. Sarbaugh*, 552 F.2d 768 (7th Cir.), *cert. denied*, 434 U.S. 889 (1977); *Little Rock School District v. Borden, Inc.*, 1978-1 CCH

to have impaired the willingness of witnesses to testify or to have lead to disclosure in organized crime or similar cases where serious harm could befall the witness. This court has been reluctant to order disclosure in this litigation and does so now in a limited fashion only after a careful balancing of all the facts; surely other courts will exercise the same meticulous care in making decisions for other litigation.

Finally, grand jury secrecy exists to protect the unindicted from dispersal to the public of derogatory comments about them. A strict protective order will shield such persons from any public ridicule or shame.

It can be seen, therefore, that the reasons still existing for secrecy are rather slight. The reasons for disclosure are, first, to arrive at a fair result in this litigation; second, to place the class plaintiffs in a position of parity with defendants as to knowledge of the grand jury testimony; third, to counter what plaintiffs allege is an unjustified and wholesale invocation of their Fifth Amendment privilege against self-incrimination by the witnesses in question. All of these reasons are really one: to enable private plaintiffs to use fruits of the enormous investigative power of the federal government where they are trying to enforce the antitrust laws as "private attorneys-general," and where they are unable without that aid to obtain meaningful discovery. All of these reasons have

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Trade Cas. ¶ 62,020 (E.D. Ark.); *In re Folding Carton Antitrust Litigation*, 1977-2 CCH Trade Cas. ¶ 61,807 (N.D. Ill.); *United States v. Borden, Inc.* 1976-2 CCH Trade Cas. ¶ 61,177 (D. Ariz.); *Boise City, Idaho v. Monroe, Inc.* 1976-2 CCH Trade Cas. ¶ 61,178 (D. Idaho); *In re Sugar Antitrust Litigation*, 1976-1 CCH Trade Cas. ¶ 60,934 (N.D. Cal.); *In re Toilet Seat Antitrust Litigation*, 1975-2 CCH Trade Cas. ¶ 60,557 (E.D. Mich.); *In re Cement-Concrete Block, Chicago Area*, 381 F.Supp. 1108 (N.D. Ill. 1974); *Connecticut v. General Motors Corp.*, 1974-2 CCH Trade Cas. ¶ 75,138 (N.D. Ill.). See also *SEC v. National Student Marketing Corp.*, 430 F. Supp. 639 (D.D.C. 1977); *United States v. American Oil Co.*, Civ. No. 370-65 (D.N.J., Oct. 15, 1971) (order), *appeal dismissed*, 456 F.2d 1013 (3d Cir. 1972); *Illinois v. Harper & Row Publishers, Inc.* 50 F.R.D. 87 (N.D. Ill. 1969).

been advanced by the plaintiffs before. At this stage in the litigation, in light of the narrow request before the court and in light of the exposure the transcripts in question have already had, the court finds that as to those transcripts to which any of the defendants have already had access the needs for disclosure outweigh the needs for secrecy. As to those transcripts to which the defendants have not had access, the balance tilts the other way, and the court will not order their disclosure.

Certain parties have requested that this question be docketed separately. The court sees no need for such a procedure where the grand jury and the criminal trial were in the same district as these civil proceedings.

THEREFORE, IT IS ORDERED that Laurence Gustafson respond to the subpoena *duces tecum* of January 3, 1980 by producing all those transcripts requested therein to which any of the non-settling defendants have had access during the criminal proceedings pursuant either to Rule 16, Fed. R. Crim. Proc., or to the Jencks Act; but no other of the requested transcripts shall be produced. These transcripts shall be disclosed only to counsel of record for plaintiffs herein and their clerical personnel, and shall be used only for the prosecution of this litigation. The transcripts and interview statements ordered disclosed may be used in depositions and at trial for the purposes of impeaching witnesses, refreshing their memory, testing their credibility and the like. Use of portions of these transcripts as substantive evidence in the civil trial will be subject to later evidentiary rulings by the Court.

IT IS FURTHER ORDERED that all motions to quash the subpoena are denied.

DONE this the 25th day of January, 1980 in Houston, Texas.

/s/ John V. Singelton
JOHN V. SINGLETON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

M.D.L. 310

IN RE CORRUGATED CONTAINER ANTITRUST LITIGATION
ALL CASES

PRETRIAL ORDER NO. 34

The attorneys for the Department of Justice, Antitrust Division, Dallas office, having filed a motion to quash the subpoena *duces tecum* which was the subject of this court's Memorandum and Order of January 25, 1980, and having expressed to the court their inability to understand and their unwillingness to obey the court's order without a specific overruling of their motion, it is hereby ORDERED:

1. The Motion of the United States to Quash Subpoena Duces Tecum and Notice of Deposition is DENIED, for the reasons set forth in the Memorandum and Order of January 25, 1980 herein. The United States is specifically relieved of any restrictions which would prohibit its compliance with this order, either under Rule 6 or under any previous protective orders.

2. The transcripts to be turned over are all those, and only those, which were turned over to the defendants in H-78-11 and H-78-12 pursuant to this court's orders, whether or not the attorneys for the Department of Justice believe they fit into the categories of Rule 16 and Jencks Act materials. Of course, only selected portions of the transcripts of witnesses other than employees of the eight non-settling defendants are requested by the subpoena and ordered disclosed hereby.

3. This order is signed for me by my law clerk at my express direction, after her reading it to me over the telephone.

DONE this 30th day of January, 1980 in Houston, Texas.

/s/ John V. Singleton
JOHN V. SINGLETON
United States District Judge
by /s/ Linda Marshall

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT* UNIT A

Nos. 80-1093, 80-1103 and 80-1264

IN RE: CORRUGATED CONTAINER GRAND JURY and CORRUGATED CONTAINER ANTITRUST CRIMINAL and CIVIL LITIGATION

ADAMS EXTRACT COMPANY, *et al.*,
Appellees,

versus

ALTON BOX BOARD COMPANY, *et al.*,
Defendants-Appellants,

KENNETH ADLER, *et al.*,
Intervenors-Appellants,

JAMES A. BRAUD, *et al.*,
Defendants-Intervenors-Appellants.

Appeals from the United States District Court for the Southern District of Texas

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* Former Fifth Circuit case, Section 9(1) of Public Law 96-452—, October 14, 1980.

ON PETITIONS FOR REHEARING

(November 27, 1981)

Before CHARLES CLARK, Chief Judge, TATE and WILLIAMS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed in the above entitled and numbered cause be and the same are hereby denied.

ENTERED FOR THE COURT:

/s/ Charles Clark
United States Circuit Judge

Opposition

Supreme Court, U.S.
FILED
MAR 31 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1583

IN THE

Supreme Court of the United States

October Term, 1981

THE MEAD CORPORATION, ET AL.,
Petitioners,

v.

ADAMS EXTRACT COMPANY, ET AL.,
Respondents.

BRIEF FOR RESPONDENTS ADAMS EXTRACT COMPANY, ET AL., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Chairman, Vice Chairman, and Members of Plaintiffs' Steering Committee, and Attorneys for the Plaintiff Certified Class, In re Corrugated Container Antitrust Litigation, on Behalf of the Respondent Class Representative Plaintiffs, Adams Extract Company, et al.

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* Counsel of Record.

COUNTER-STATEMENT OF THE QUESTION PRESENTED FOR REVIEW

Whether, in a multidistrict class action case, the court of appeals correctly held that the appeal from the district court's discretionary pretrial discovery order requiring the production of a limited number of transcripts and transcript excerpts of grand jury proceedings and Government interviews was moot after production of the transcripts and excerpts and the completion of the trial in the class action case, where the court of appeals' ruling requires the return of the transcripts and excerpts?

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No. 81-1583

IN THE

Supreme Court of the United States

October Term, 1981

THE MEAD CORPORATION, ET AL.,
Petitioners,

v.

ADAMS EXTRACT COMPANY, ET AL.,
Respondents.

BRIEF FOR RESPONDENTS ADAMS EXTRACT COMPANY, ET AL., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondents Class Representative Plaintiffs Adams Extract Company, et al., respectfully request this Court to deny the Petition for a Writ of Certiorari for the reasons set forth below.[1]

1. This Brief in Opposition is respectfully submitted by the undersigned members of the Plaintiffs' Steering Committee and attorneys for the plaintiff certified class in the Corrugated Container Antitrust Litigation, M.D.L. 310 (S.D. Tex.), on behalf of the class action plaintiffs designated by the district court to represent the plaintiff certified class. The designated class representative plaintiffs are Adams Extract Company, Atlas Container Co., Inc., Bert Paley, Ltd., Bodines, Inc., Great Northern Packaging Corp., Grist Mill Company,

STATEMENT OF THE CASE

Petitioners consist of one corporate defendant—The Mead Corporation ("Mead")—and several individual employees of Mead and certain other corporate defendants in the *Corrugated Container Antitrust Litigation*, M.D.L. 310 (S.D. Tex. 1977). This litigation ("M.D.L. 310") encompasses more than sixty class and individual private treble damage actions brought in the Spring of 1977 on behalf of purchasers of corrugated containers and sheets located throughout the United States. The plaintiffs charged some thirty-nine corporate defendants with conspiring over a period of many years to raise, fix, maintain, or stabilize the prices of corrugated containers and sheets in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1 (1970).

In September of 1978, the district court certified a national class of all persons who purchased corrugated containers or sheets from the defendants (or their subsidiaries and affiliates) at any time during the period from January 1, 1960, to January 25, 1978. *In re Corrugated Container Antitrust Litigation*, 80 F.R.D. 244 (S.D. Tex.), *mandamus denied*, No. 78-3684 (5th Cir. 1978).

All of the defendants other than Mead settled with the plaintiff class by the Summer of 1980. Mead alone de-

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Haeger Potteries, Inc., Ilikon Corporation, Jefferson Orchards, Inc., Northland Aluminum Products, Inc., Rollins Container, Inc., Sambo's Restaurants, Inc., Tierra Royal Potteries, Inc., Westside Paper Company and Winona Industries, Inc. In compliance with Rule 28.1 of this Court, please note that After Six, Inc. is a parent company of Bert Paley, Ltd. The plaintiff certified class consists of an estimated 200,000 persons in the United States who purchased corrugated containers or corrugated sheets from the defendants (or their subsidiaries or affiliates) during the period from January 1, 1960, through January 25, 1978.

clined to settle and was found by a jury after four months of trial to have participated in a price-fixing conspiracy.[2]

During the course of pretrial discovery proceedings, the plaintiffs on four different occasions, sought access to transcripts of testimony given before a federal grand jury and of interviews conducted by the Government in connection with the grand jury's investigation.[3] Finding that the plaintiffs had made an insufficient showing to compel production, the district court denied the first three motions.[4]

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2. Contrary to Petitioners' assertions, there was no failure of proof of damages by plaintiffs at the trial. Pursuant to the prior understanding of the parties and the order of the district court, the narrow issue concerning the dollar amount of damages was bifurcated from the other issues and properly reserved for determination in separate proceedings. That proceeding is still in progress.

3. Approximately 200 witnesses had either appeared live before a grand jury impaneled in Houston, Texas or had been interviewed by the government in connection with an investigation conducted by the grand jury in 1976 and 1977 of the corrugated container industry. On January 25, 1978, two indictments were returned by the grand jury charging 14 corporate defendants, including Petitioner Mead, and 26 individual defendants with a conspiracy to fix prices of corrugated containers and corrugated sheets in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. United States v. International Paper Co., Cr. No. H-78-11 (S.D. Tex. filed Jan. 25, 1978); United States v. Boise Cascade Corp., Cr. No. H-78-12 (S.D. Tex. filed Jan. 25, 1978). All but Mead and one other corporate defendant and seven individual defendants entered pleas of nolo contendere to the indictments and were sentenced accordingly. All of the defendants who elected to go to trial were acquitted by the jury on April 27, 1979, thus terminating the criminal cases.

4. The district court reached this decision although most courts considering disclosure of grand jury materials to antitrust plaintiffs in the last five years had ordered such disclosure. Petrol Stops Northwest v. United States, 571 F.2d 1127 (9th Cir. 1978), *rev'd on other grounds*, 441 U.S. 211 (1979), *on remand*, 647 F.2d 1005 (9th Cir.), *cert. denied*, 50 U.S.L.W. 3465 (Dec. 7, 1981); Illinois v. Sarbaugh, 552 F.2d 768 (7th Cir.), *cert. denied*, 434 U.S. 889 (1977); Little Rock School Dist. v. Borden, Inc., 1978-1 Trade Cas. (CCH)

In December, 1979, nine months after the termination of the criminal cases, plaintiffs renewed their request for discovery of certain grand jury materials. Not only was this request more limited in scope than plaintiffs' earlier requests, but plaintiffs advanced new grounds demonstrating "particularized need" under the standard established by this Court's decisions. First, plaintiffs demonstrated that an overwhelming number of persons apparently implicated in the conspiracy had invoked their fifth amendment privilege against self-incrimination, thereby blocking access to the evidence they could give in M.D.L. 310. Based on the few grand jury transcripts and Government interviews the plaintiffs had managed to obtain, plaintiffs had reason to believe that the publicly-available criminal trial testimony represented only a tiny fraction of the evidence gathered by the Government which would tend to prove the culpability of the nonsettling defendants. Nevertheless, a veritable "stonewall" against the disclosure of the truth had been erected in this case based on the invocation of the fifth amendment by scores of deponents, ultimately numbering approximately 150 witnesses. Plaintiffs demonstrated that unless they were

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¶ 62,020 (E.D. Ark); In re Folding Carton Antitrust Litigation, 1977-2 Trade Cas. (CCH) ¶ 61,807 (N.D. Ill.); United States v. Borden, Inc., 1976-2 Trade Cas. (CCH) ¶ 61,177 (D. Ariz.); Boise City, Idaho v. Monroe, Inc., 1976-2 Trade Cas. (CCH) ¶ 61,178 (D. Idaho); In re Sugar Antitrust Litigation, 1976-1 Trade Cas. (CCH) ¶ 60,934 (N.D. Cal.); In re Toilet Seat Antitrust Litigation, 1975-2 Trade Cas. (CCH) ¶ 60,557 (E.D. Mich.); In re Cement-Concrete Block, Chicago Area, 381 F. Supp. 1108 (N.D. Ill. 1974); Connecticut v. General Motors Corp., 1974-2 Trade Cas. (CCH) ¶ 75,138 (N.D. Ill.); *see also*, SEC v. National Student Marketing Corp., 430 F. Supp. 639 (D.D.C. 1977); United States v. American Oil Co., No. 370-65 (D.N.J. Oct. 15, 1971) (order), *appeal dismissed*, 456 F.2d 1043 (3d Cir. 1972); Illinois v. Harper & Row Publishers, Inc., 50 F.R.D. 37 (N.D. Ill. 1969).

granted access to the grand jury transcripts there might well be a miscarriage of justice in this case.

Second, plaintiffs demonstrated by defendants' interrogatory answers that certain of the defendants, including Mead, had previously had access to all of the transcripts plaintiffs sought. Such exclusive access to those transcripts would have given defendants an enormous advantage at trial. Further, such widespread disclosure of the transcripts demonstrated that there was little, if any, need to keep the transcripts secret from the plaintiffs.

In addition, among other grounds, plaintiffs showed that the transcripts were needed for impeachment: the exculpatory answers of the nonsettling defendants to plaintiffs' pleadings were apparently inconsistent with the fact that the United States had named 123 employees of four of the nonsettling defendants as co-conspirators in the criminal case.

Based on this showing of particularized need, and upon other facts and circumstances appearing in the record, and weighing this need against the relatively slight remaining interest in maintaining continued secrecy from the plaintiffs, the district court, on January 25, 1980, granted plaintiffs' request in part, allowing production of transcripts which had previously been disclosed to the defendants in the criminal cases, but limiting disclosure to the testimony given by employees of the then nonsettling defendants and to those portions of the testimony of the other witnesses expressly referring to the nonsettling defendants.

The district court also imposed a stringent protective order narrowly limiting disclosure:

> These transcripts shall be disclosed only to counsel of record for plaintiffs herein and their clerical personnel, and shall be used only for the prosecution of this litigation. The transcripts and interview statements ordered disclosed may be used in depositions and at trial for the purpose of impeaching witnesses, refreshing their memory, testing their credibility and the like.

Order of January 25, 1980, Appendix B to Petition for Writ of Certiorari at 11a. The same day, petitioners unsuccessfully applied to the district court for a stay order.

Petitioners filed a notice of appeal from this order and requested a stay of the district court's order, arguing that "[d]enial of this stay would, in effect, render appellants' appeal moot and fruitless." Motion of Grand Jury Witness Intervenors-Appellants To Stay Pending Appeal Order Requiring United States To Comply With Subpoena Duces Tecum For Production of Secret Grand Jury Transcripts, at 3 No. 80-1093 (5th Cir., filed Jan. 28, 1980).

Other Petitioners also moved the Fifth Circuit for a stay order pending appeal. Petitioner Mead joined a brief in support of this motion, which stated:

> [I]t is clear that . . . unless a stay is granted by [the Fifth Circuit] *any appeal is moot and meaningless,* since the transcripts would have been produced. . . . Once the cloak of secrecy is lifted, no appellate review can revive the rights of those concerned to the protection afforded by that long established rule.

Memorandum in Support of Motion of Defendants-Appellants to Stay Order Pending Appeal Which Orders the United States to Comply with a Subpoena Duces Tecum Requiring Disclosure of Secret Grand Jury Transcripts

at 32, No. 80-1093 (5th Cir., filed Jan. 29, 1980) (emphasis added). On January 29, 1980, the Fifth Circuit denied the stay.

On January 30, 1980, petitioners applied to this Court for a stay pending appeal. In that application, petitioners stated:

> [I]f the stay is denied . . . there will then occur the disclosure of the secret Grand Jury transcripts, . . . , and neither Defendants-Applicants, Grand Jury Witness Intervenors or other Intervenors who might be adversely affected will be able through appeal to protect against the injury which will result from such disclosure; . . .

Application For a Stay of an Order of the United States District Court for the Southern District of Texas, Houston Division, Requiring Disclosure of 135 Secret Grand Jury Transcripts to Private Civil Plaintiffs at 4, No. A-644 (filed Jan. 30, 1980). Petitioner's memorandum in support of their application contained the following language:

> [T]he appeal will become moot the instant that the United States Government complies with the order of the district court, . . .

Memorandum of Applicants in Support of a Stay Order of the United States District Court for the Southern District of Texas, Houston Division, Requiring Disclosure of 135 Secret Grand Jury Transcripts to Private Civil Plaintiffs at 4, No. A-644 (filed Feb. 4, 1980).

On January 31, 1980, Mr. Justice Rehnquist granted the motion for a temporary stay, but lifted that stay on February 5, 1980. The same day, Petitioners submitted

a letter to the Clerk of this Court requesting that Mr. Justice Brennan consider its application for stay. On February 6, 1980, Mr. Justice Brennan denied an interim stay, but referred the application to the Conference of the Court scheduled for February 15, 1980, which denied the requested stay.

On February 19, 1980, Petitioners filed with the Fifth Circuit a motion for an expedited hearing of their appeal and a new motion for an interim stay of the district court's order. The brief in support of that motion contained the following statements:

> *An Interim Stay is Essential to Prevent This Appeal From Becoming Moot. . . .*
>
> . . . [if the transcripts are produced,] grand jury secrecy will be forever breached. . . . *All the interests* of maintaining grand jury secrecy will be lost.

Brief in Support of Motion of Certain Appellants for an Expedited Appeal and Interim Stay, Pending Appeal, of the January 25, 1980 District Court Order Requiring the United States to Produce to Civil Plaintiffs 135 Grand Jury Transcripts at 10, No. 80-1093 (5th Cir. filed Feb. 19, 1980) (emphasis added). The Fifth Circuit denied the motion.

Thus, Petitioners represented to this Court and the courts below on at least six occasions that their appeal would be moot unless the order granting production were stayed. On each occasion the requested stay was denied.

Only after the foregoing appellate remedies were exhausted, the Department of Justice selected the limited transcripts covered by the disclosure order and supplied copies of those transcripts to counsel for the plaintiffs.

Counsel for plaintiffs carefully reviewed the transcripts and interview statements and utilized them in the last days of pretrial discovery and during the trial in accordance with the strictures placed on such use by the district court's protective order and subsequent orders issued in the case.

The court of appeals subsequently heard this appeal on an unexpedited basis. The Fifth Circuit declared the disclosure order moot and vacated that order to preclude the order's having any further effects. The Fifth Circuit also made clear that the effect of its order would be to require the return of the transcripts. Appendix A to Petition for Writ of Certiorari at 5a.

REASONS FOR DENYING THE WRIT

The Petition fails to state any reason for granting certiorari. Rule 17 of this Court provides:

> 1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling or fully measuring the court's discretion, indicate the character of reasons which will be considered.
>
> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision. . . .

> (c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

Petitioners have shown no conflict among the circuits, no conflict with the decisions of this Court, no important question of federal law that this Court has not previously decided, and certainly no unusual departure from the normal course of judicial proceedings.

To the contrary, the present Petition involves a matter peculiarly unsuited for this Court's discretionary review. In the first place, because the Fifth Circuit's decision, which required return of the transcripts, provides Petitioners the complete relief which they might have obtained had they prevailed on the merits, nothing remains to be accomplished by this Court's review; furthermore, the narrow issue of mootness, the only issue properly raised in these proceedings, raises no question of general importance. Second, in the unlikely event Petitioners persuaded this Court that this proceeding—in spite of their repeated representations to the contrary—has not become moot, the resulting remand to the Fifth Circuit would entail nothing more than requiring, at most, an inquiry into whether the district court abused its discretion in ordering disclosure. Regardless of how this question might be resolved by the court of appeals, it would not present a question worthy of this Court's review. Last, even if the order appealed from were determined not to be moot, it is still not properly subject to review because it is a nonappealable, interlocutory order.

1. No Important Question Has Been Presented For Review and No Conflict Among the Circuits Has Been Shown Concerning the Court of Appeals' Determination that the Appeal Is Moot

The Fifth Circuit held that the appeal was moot in the particular facts and circumstances of this case. The disclosure order had directed the Government to produce, pursuant to a subpoena duces tecum issued in M.D.L. 310, transcripts and excerpts of grand jury testimony and interview statements taken by the Government outside the presence of the grand jury. Petitioners had sought to block the production by requesting a stay of the order from the district court, the court of appeals, and this Court. Each time Petitioners argued that unless the order were stayed, they would be denied appellate review on the merits because the appeal would be rendered moot upon disclosure of the transcripts. Indeed, in their opening brief on the merits in the Fifth Circuit, Mead argued that the appeal was not moot because the transcripts and statements had not yet been turned over by the Government to the plaintiffs. Joint Brief for Appellants at 3 n. 3, No. 80-1093 (5th Cir. filed Feb. 20, 1980).

By the time the parties argued this appeal, the class action trial before the jury had taken place. Pursuant to the district court's order, certain of the transcripts had been used in pretrial depositions, and excerpts from certain transcripts had been introduced in evidence at the trial. There is no further use to which the transcripts may be put by the class action plaintiffs, except, perhaps, upon the unlikely event of a retrial of the case.

The Fifth Circuit held that, under these circumstances, any "continuing interest" the class plaintiffs may have in

the future use of the transcripts is "speculative." *In re Corrugated Container Antitrust Litigation*, 659 F.2d 1330 at 1332 (5th Cir. 1981). The panel declared:

> Such a contingent future interest cannot overcome our jurisdictional concern that there is no live controversy at stake now.

Id.

The court of appeals decision effectively grants Petitioners all of the relief that they might have obtained had they prevailed on the merits. Under that court's decision, all of the transcripts and excerpts are to be returned and, therefore, will not be put to any further use.

Moreover, Petitioners have failed to demonstrate that the Fifth Circuit's decision on the issue of mootness, which is the only question that court decided, raises any questions worthy of review by this Court. The application of the law of mootness to the unique facts presented here raises no question of general importance. Further, none of the cases cited by Petitioners demonstrates any conflict among the circuits or with the decisions of this Court.

Petitioners first argue that the Fifth Circuit was required to grant "immediate review" of the disclosure order in order to render appellate review possible. (Pet. at 13-15.) None of the cases cited by Petitioners, however, hold that a court of appeals *must* grant a stay to preserve an issue for appeal.[5]

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5. The cases cited, Cobbledick v. United States, 309 U.S. 323 (1940); Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979); Perlman v. United States, 247 U.S. 7 (1918); United States v. Procter & Gamble Co., 356 U.S. 677 (1958); and United States v. Ryan, 402 U.S. 530 (1971), only decided questions concerning the

Petitioners next argue that the transcripts are subject to further use by the opt-out plaintiffs and that therefore a controversy still exists between Petitioners and the opt-out plaintiffs concerning the transcripts. (Pet. at 17-20.) Petitioners say this issue is highlighted by the use by the opt-out plaintiffs of one of the transcripts in a matter in which this Court has granted certiorari.[6] Indeed, Petitioners go so far as to suggest that if this Court were to grant certiorari in this case it could avoid deciding the question presented in that matter. (Pet. at 19.)

This argument based on the use of grand jury transcripts in the opt-out cases, however, must fail. In the first place, whether or not the court of appeals correctly considered the use of the transcripts by the opt-out plaintiffs is hardly a question of general importance.[7] Rather, that question necessarily depends on the particular facts of this case.

Second, to the extent, if any, that the district court's order granted the opt-out plaintiffs access to the transcripts, the decision of the Fifth Circuit will require the opt-out plaintiffs to return the transcripts as well. Petitioners' entire argument regarding the opt-out plaintiffs' use

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right to appeal at all, not whether an appeal might be mooted by the timing of disclosure or the failure to obtain a stay. These cases lay down no special rule, unique to our jurisprudence, requiring the issuance of stay in every case that an order is made requiring the production of grand jury materials.

6. In re Corrugated Container Antitrust Litigation, 661 F.2d 1145 (7th Cir. 1981) (en banc), *cert. granted sub nom.*, Pillsbury Co. v. Conboy, 50 U.S.L.W. 3457, No. 81-825 (Jan. 11, 1982) (Appeal of Conboy).

7. In fact, the purported "continuing interest" of the lead Petitioner, Mead, as to any use by the opt-out plaintiffs of these transcripts is open to serious question in view of the fact that Mead recently settled with all of the opt-out plaintiffs and all of those cases have been dismissed with prejudice as to Mead.

of the transcripts hinges on the irrelevant premise that the district court's order directed production to the opt-out plaintiffs as well as the class plaintiffs. Regardless of whether the order directed disclosure to all plaintiffs or only to class plaintiffs, it was that *same* order that was appealed to the Fifth Circuit and vacated by the Fifth Circuit. Whichever plaintiffs were the beneficiaries of the district court's disclosure order, it is those same plaintiffs that must now return the transcripts. Therefore, there is no current controversy between the Petitioners and *any* plaintiffs in M.D.L. 310 over the grand jury transcripts produced pursuant to the order at issue in the present proceedings.

Moreover, the chief example of use of the transcripts by opt-out plaintiffs used by Petitioners (Pet. at 18-19.) is entirely without foundation in the record. The complete grand jury and Government interview transcripts used by opt-out plaintiffs in the Conboy deposition and which provided the basis for the fifth amendment ruling at issue in the *Conboy* appeal was produced by the Government pursuant to an entirely separate order of the district court. The district court ordered the entire transcript of the grand jury testimony and Government interview of John A. Conboy turned over to the plaintiffs in its Pretrial Order No. 49, filed on April 30, 1980, on a separate motion and showing by plaintiffs of "particularized need" for disclosure of those transcripts alone. Thus, even if this Court were ultimately to grant certiorari and reverse on the issue of the propriety of the disclosure ordered by the court's orders of January 25 and 30, 1980, such reversal could not possibly affect the outcome of the *Conboy* case, because the complete Conboy transcripts were disclosed pursuant to a different district court order.

Third, any questions concerning the uses to which the transcripts have been put in the past are entirely separate and independent from the question as to whether they were properly disclosed in the first place. Thus, contrary to Petitioners' unsupported assertion, the past use of any of the transcripts by the opt-out plaintiffs represents a matter that could not possibly revive the now "dead" question of disclosure.

Thus, Petitioners' arguments regarding the opt-out plaintiffs are based on an erroneous construction of the Fifth Circuit's decision and, to the extent they are based on the asserted interrelationship with the *Conboy* case, are contrary to the record in this case.

The cases cited by Petitioners in support of their argument that the Fifth Circuit applied on an "erroneous standard" of the law of mootness (*see* Pet. at 22-25) are completely inapposite and establish no conflict among the circuits or with the decisions of this Court.

The principal case upon which Petitioners rely, *Dennis v. United States*, 384 U.S. 855 (1966), neither presented nor decided any question concerning the law of mootness.

In *Dennis*, this Court held that the grand jury testimony of four Government witnesses should have been produced to the defendants in a criminal case, citing earlier cases of this Court's establishing that "after the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it." *Id.* at 870. This Court further held that upon a showing of "particularized need" for disclosure, *in camera* inspection of the transcripts to determine whether inconsistencies exist as to particular passages is neither necessary nor desirable. *Id.* at 874-75.

The Court ordered the judgment of conviction reversed on the ground that access to the transcripts had been improperly denied. Because one of the four witnesses had died in the interim and could no longer be subject to cross-examination at retrial, the Court ordered that the prior trial testimony of the witness could not be used at the retrial since the witness had not been subject to cross-examination based on the grand jury transcript. *Id.* at 868 n.17.

The issue decided in *Dennis,* namely, whether prior testimony not subject to cross-examination based on an unavailable transcript should be suppressed, has absolutely nothing to do with the question of whether a disclosure order is moot where the transcripts have been turned over and any further use is at best speculative.

The principal lower court decisions cited by Petitioners in support of their argument concerning the supposed application of an "erroneous" standard (*see* Pet. at 24) are two Fifth Circuit cases, which, because they are decisions of the same circuit that decided the appeal under attack here, fail to establish that there is any conflict among the circuits on the standard of mootness.[8]

Petitioners' last argument, that this appeal should not be held as moot under the exception for orders "capable of repetition, yet evading review," completely misconstrues

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8. These cases, FTC v. Gibson Products, Inc., 569 F.2d 900 (5th Cir. 1978), and Atlantic Richfield Co. v. FTC, 546 F.2d 646 (5th Cir. 1977), are consistent with the Fifth Circuit's decision in this case. These FTC cases, which do not involve grand jury transcripts at all, only decide that appeals from orders compelling the production of documents were not moot after their production when it was contemplated that they would be used in ongoing administrative proceedings before the FTC, and relief in the nature of an order requiring the documents to be returned could be granted.

and misapplies that exception. The exception can have no application to a decision that necessarily turns on the unique, intensely factual determination of whether "particularized need" has been demonstrated in a given case to justify disclosure of transcripts.

Moreover, the subsequent decision of the Fifth Circuit regarding the disclosure of additional transcripts to the opt-out plaintiffs cited by Petitioners (Pet. at 16) refutes Petitioners' argument. *In re Corrugated Container Antitrust Litigation*, 667 F.2d 4 (5th Cir. 1982). That decision demonsstrates that *in this very case* review of a grand jury transcript disclosure order is not only possible, but has actually occurred. Thus, disclosure orders will not "evade review" as a result of the court of appeals' ruling on the present appeal. Indeed, the ruling in the opt-out appeal conclusively demonstrates that the instant petition does not present any questions going beyond the unique facts and circumstances surrounding the disclosure order of January 25, 1980.

2. The Petition Does Not Raise Any Important Issues Regarding the Merits of the Disclosure Order

Petitioners attempt to bolster their position by raising arguments concerning the underlying merits—that is, whether the district court properly ordered disclosure of the transcripts. Of course, that issue is not properly before this Court in these proceedings, which concern only the Fifth Circuit's mootness decision. Nevertheless, because Petitioners have raised arguments concerning the merits of the disclosure order, Respondents will demonstrate why those arguments fail to present any questions worthy of this Court's review.

There is no reasonable likelihood that this Court would ultimately grant certiorari on the issue of whether the district court abused its discretion by ordering production of the grand jury transcripts at issue here. This underlying issue closely resembles the garden variety of routine discovery orders made in civil cases every day of the week. Such determination is intensely factual and would not satisfy the criteria of Rule 17 of this Court. *See* pp. 9-10 *supra*. Moreover, this Court has declined to grant certiorari to review transcript disclosure orders that were based on showings of need substantially less than Respondents demonstrated to the court below. *Alton Box Board v. United States*, 436 U.S. 962 (1978); *Illinois v. Sarbaugh*, 434 U.S. 889 (1977); *see also United States v. American Oil Co.*, 409 U.S. 893 (1972); *United States Indus. Inc. v. United States District Court*, 382 U.S. 814 (1965).[9] In the *Alton Box* and *Sarbaugh* decisions the lower courts ordered disclosure without balancing the interests as carefully as did the district court here. In fact, the district court in this case had previously refused plaintiffs' requests for disclosure in M.D.L. 310 insofar as those requests were premised solely on the ground that the witnesses' defendant-employers already had seen their employees' transcripts—precisely the decisive consideration in *Alton Box* and *Sarbaugh*. *See* Memorandum and Order, M.D.L. 310 (S.D. Tex., filed July 26, 1979).

The district court did not disregard the applicable law. Rather, the district court expressly applied this Court's

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9. Indeed in *Douglas Oil* itself, this Court recently denied certiorari from the decision of the Ninth Circuit affirming the district court's order granting disclosure of the grand jury transcripts at issue in that case. Petrol Stops Northwest v. Continental Oil Co., 647 F.2d 1005 (9th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3465 (Dec. 7, 1981).

precedent, particularly the criteria set forth in *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211 (1979). The district court, having presided over all criminal proceedings and discovery in the civil case, was uniquely suited to discharge this discretionary undertaking. Indeed, the disclosure order itself clearly demonstrates the careful nature of the district court's consideration of the relevant interests and that court's scrupulous adherence to the precise balancing test specified in *Douglas Oil*. The district court found that the need for continued secrecy of these transcripts was slight because the criminal proceedings were concluded and the transcripts had all been previously disclosed to the corporate criminal defendants, including Mead.

The court weighed the slight residual need for secrecy against the need to (1) avoid misleading the trier of fact; (2) put the plaintiffs on an equal footing with defendants as to knowledge of grand jury testimony; and (3) offset the frustration of normal civil discovery by the widespread and unprecedented invocation of the fifth amendment privilege against self-incrimination by literally scores of deponents.

As noted, the district court ordered disclosure of only those transcripts that Mead and certain other M.D.L. 310 defendants had seen. Mead and these defendants, of course, constituted the only persons who might possibly seek retribution against the witnesses for their grand jury testimony. Furthermore, the district court entered a protective order placing strict limits as to how the transcripts could be used. Also, given the limited number of transcripts and excerpts disclosed, no wholesale disclosure

took place; indeed, the court denied plaintiffs access to the bulk of the grand jury transcripts.[10]

Four times Respondents attempted to obtain grand jury transcripts under the *Douglas Oil* balancing test. Three times the district court found that Respondents had not satisfied this test. Respondents then narrowed their request even further and presented a strong showing of need; as a result, this request was granted in part. Thus, if anything, it must be clear on this record that the district judge has taken very seriously his responsibility to safeguard grand jury secrecy to the fullest extent appropriate. Accordingly, the disclosure as ordered by the district judge lay well within the range of the discretion reposed in him as announced by the decisions of this Court. In these circumstances, where the question that underlies these proceeding would not warrant this Court's review, Respondents respectfully submit that this Court should decline to grant certiorari to review an entirely preliminary question regarding mootness.

3. The Disclosure Order Is Not Appealable.

The most elementary principles of judicial economy require the entry of a final judgment before any party can take an appeal. *See* 28 U.S.C. § 1291 (1970). Any other rule would result in a piecemeal review procedure that would totally disrupt our judicial systems. *See, e.g., Switzerland Cheese Ass'n v. E. Horne's Market, Inc.*, 385 U.S. 23, 24 (1966).

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10. Petitioners falsely imply on a number of occasions that 135 full transcripts were released. (Pet. at (i), 1, 8, 17, 24.) In fact, only 36 full transcripts were released. The balance of the documents produced consist of carefully selected excerpts, some only of a handful of pages, taken from the transcripts of the testimony of 99 witnesses.

This Court has long viewed with extreme disfavor attempted appeals of discovery orders prior to the entry of a final judgment in a case. In *Alexander v. United States*, 201 U.S. 117 (1906), for example, the Court held that orders directing witnesses to answer questions and produce documents were interlocutory in nature and not appealable.

This strong policy against piecemeal appeals from interlocutory discovery orders applies to production of grand jury transcripts as well. *Baker v. United States Steel Corp.*, 492 F.2d 1074 (2d Cir. 1974), is directly on point. In *Baker*, a private antitrust case, the trial court ordered production of grand jury testimony to the plaintiff. The defendant sought a stay of production, but the appellate court determined that the discovery order was interlocutory in nature and, therefore, unappealable. Accordingly, the court refused to permit the appeal even though the district court had erroneously applied a "slight need" standard rather than the proper "particularized need" standard in ordering disclosure. Because the district court in the instant case applied the proper standard in ordering production, the present attempt at interlocutory review has far less merit than *Baker* did.

Here, no final judgment has been entered against Petitioner Mead. Indeed, proceedings are now underway designed to reduce the civil jury's verdict against Mead to just such a final judgment. Petitioner Mead, then, must await final judgment before seeking an appeal. The other Petitioners all intervened in M.D.L. 310. As intervenors, they enjoy the rights, but must accept the burdens, of parties. Therefore, the individual Petitioners, like Mead,

must bear the burden of awaiting final judgment before taking an appeal.[11]

Congress has provided certain procedures for taking an interlocutory appeal. An interlocutory appeal might in some instances lie under 28 U.S.C. § 1292(b). Indeed, the grand jury transcript decision in *Texas v. United States Steel Corporation*, 546 F.2d 626 (5th Cir.), *cert. denied*, 434 U.S. 889 (1977), resulted from a § 1292(b) appeal. Petitioners here did not request, and the district court did not certify, a § 1292(b) appeal.[12]

In *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), the Supreme Court held that an order meeting certain basic requirements could be treated as "final" and therefore reviewable for purposes of § 1291. The *Cohen* doctrine, however, does not provide an avenue for appeal here.

The order of disclosure of grand jury transcripts simply does not meet the *Cohen* test. First, unlike *Roe v. Wade*, 410 U.S. 113 (1973), in which the status quo could never be maintained by a stay order, disclosure orders

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11. Certain parties below attempted to create a basis for appeal by arguing that the disclosure order somehow "merged" into the final judgments entered with respect to the class action settlements. Because those parties—all settling defendants—have not chosen to participate in the instant Petition, even this disingenous attempt to create appealability cannot save Petitioners here. In any event, those settlement judgments could not serve as proper vehicles for appealing this issue, since the discovery order in question here could not be considered an ingredient of or prepatory to such judgments.

12. Because the discovery order was discretionary and did not decide any question of general importance, the court of appeals would have been correct in denying application for leave to appeal even if § 1292(b) certification had been given by the district court. *See* Atlantic City Elec. Co. v. A.B. Chance Co., 313 F.2d 431 (2d Cir. 1963).

are always subject to immediate review through a request for stay and expedited appeal. Furthermore, the issue decided in the courts below will not generally evade review—the Fifth Circuit ruled that the order was moot in this case because the transcripts had been produced and the trial had concluded before the appeal to the Fifth Circuit was decided.

Moreover, the *Cohen* exception does not apply, because the district court's order did not decide any serious and unsettled question of law. In *Cohen* the Supreme Court excluded from interlocutory appellate review matters which were committed to the discretion of the district court.

> We do not mean that every order fixing security is subject to appeal. Here it is the right to security that presents a serious and unsettled question. If the right were admitted or clear and the order involved only an exercise of discretion as to the amount of security, a matter the statute makes subject to reconsideration from time to time, appealability would present a different question.

337 U.S. at 547. The Second Circuit explained the rationale for the strong federal policy against interlocutory appeals as the need not to "open the way for a flood of appeals concerning the propriety of a district court's ruling on the facts of a particular suit." *Weight Watchers of Philadelphia, Inc. v. Weight Watchers International, Inc.*, 455 F.2d 770, 773 (2d Cir. 1972); *see also, In re Corrugated Container Antitrust Litigation*, 611 F.2d 86, 87-88 (5th Cir. 1980); 15 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3911, at 495 (1976).

The district court's order here represents a careful and measured application of the standard announced in *Douglas Oil*. It is clear that where, as here, the disclosure order was based on the exercise of the district court's discretionary application of the correct legal principles to the unique facts of this case, no important question of law is presented, far less one deserving the attention of this Court.

CONCLUSION

No reason having been shown why this Court should issue its writ of certiorari, it is respectfully submitted that the Petition should be denied.

DATED: March 26, 1982

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Petitioner's Reply Brief

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No. 81-1583

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE MEAD CORPORATION, ET AL.,
Petitioners,

v.

ADAMS EXTRACT COMPANY, ET AL.,
Respondents.

REPLY BRIEF FOR PETITIONERS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1583

THE MEAD CORPORATION, ET AL.,
Petitioners,

v.

ADAMS EXTRACT COMPANY, ET AL.,
Respondents.

REPLY BRIEF FOR PETITIONERS

Pursuant to Rule 22.5 of the Rules of this Court, petitioners, The Mead Corporation ("Mead") and numerous grand jury witnesses,[1] respectfully submit this reply brief in support of their petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

The effect of the Fifth Circuit's decision is to establish a procedure whereby the issue of disclosure of grand jury transcripts can never be reviewed on appeal when a stay of a disclosure order is not granted. The procedure would be that if there is no stay, grand jury transcripts would be disclosed and used prior to an appeal being heard by an appellate court. Then, so the argument goes, since there has been disclosure and use

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[1] In the second sentence of their opposition brief, respondents mischaracterize the identity of petitioners. Petitioners are Mead and forty-one individual grand jury witnesses, including eleven Mead employees, and not "certain other corporate defendants in the *Corrugated Container Antitrust Litigation*." (Opposition Brief at 2.)

of the transcripts, the issue is moot and cannot be reviewed on appeal. Thus, the result is there will be no appellate review where a district court fails to follow this Court's decisions limiting disclosure of grand jury transcripts in *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211 (1979) ("Douglas Oil") and *United States v. Procter & Gamble Co.*, 356 U.S. 677 (1958) ("Procter & Gamble"). Such a procedure is obviously contrary to the important policy of preserving the secrecy of grand jury proceedings.

Respondent class plaintiffs ("respondents") assert three points in opposition, none of which provides a basis to deny the petition. Respondents claim that:

1. Petitioners have obtained "complete relief" and "nothing remains to be accomplished" by review in this Court since the grand jury transcripts are required to be returned (Opposition Brief at 10);

2. The issue of whether the district court improperly ordered the wholesale disclosure of 135 grand jury transcripts is not "worthy of this Court's review" (Opposition Brief at 10); and

3. The district court's order is a "nonappealable, interlocutory order" (Opposition Brief at 10).

Respondents are wrong on each point.

I. THE ISSUE OF THE IMPROPER RELEASE AND CONTINUED USE OF THE GRAND JURY TRANSCRIPTS IS NOT MOOT AND PETITIONERS ARE ENTITLED TO FURTHER RELIEF

A. This Appeal Raises The Threshold Issue in *Pillsbury v. Conboy*

The related nature of this petition to the appeal already before this Court in *Pillsbury v. Conboy*, No. 81-825, is clear. If the transcript of the grand jury testimony of Conboy (a petitioner herein) was released without following the standards in *Douglas Oil* and

Procter & Gamble, then this court does not need to reach the question in *Pillsbury v. Conboy* of whether Conboy could be compelled to answer in a deposition the same questions taken verbatim from his grand jury transcript. As stated to this Court by the respondent in *Pillsbury v. Conboy*:

> The Fifth Circuit dismissed the appeal of Judge Singleton's disclosure order on October 29, 1981. *In re Corrugated Container Grand Jury*, 659 F.2d 1330 (5th Cir. 1981). The propriety of Judge Singleton's order disclosing the interview and grand jury transcripts of Mr. Conboy and others is the subject of a separate petition for certiorari, *The Mead Corporation, et al. v. Adams Extract Co., et al.*, No. 81-1583, which was filed with the Court on February 24, 1982. If this Court finds the disclosure of Mr. Conboy's interview and grand jury testimony to be improper, then this Court does not have to reach the question raised by Petitioners in the pending appeal.

Brief For Respondent, *Pillsbury v. Conboy*, No. 81-825, dated March 23, 1982, at 5 n.5.

Respondents, however, contend that the entire grand jury transcript of petitioner Conboy was released, not under the January 25, 1980 order, but under Pretrial Order No. 49, filed April 30, 1980, and that granting certiorari and an ultimate remand on this appeal "could not possibly affect the outcome of the *Conboy* case." (Opposition Brief at 14.). This contention has no merit. While Pretrial Order No. 49 subsequently released Conboy's entire grand jury transcript, the January 25, 1980 order had previously released excerpts from Conboy's grand jury transcript. These excerpts contained the questions used by the opt-out plaintiffs in Conboy's deposition, which form the basis for the Fifth Amendment issue in *Pillsbury v. Conboy*. Indeed, opt-out plaintiffs state in their brief in that appeal that the "Memorandum and Order of January 25, 1980" ordered that portions "of the immunized government interview statements and Grand Jury testimony of certain witnesses

be produced to attorneys for the class and opt-outs. *Included in the materials covered by this Order were parts of Conboy's interview and Grand Jury transcripts.*" Brief For The Petitioners, *Pillsbury v. Conboy*, No. 81-825, at 4 & n.3 (emphasis added). It is irrelevant that Conboy's entire grand jury transcript may have been subsequently released under a different court order. As admitted by the opt-out plaintiffs, the appeal in *Pillsbury v. Conboy* arises from those portions of Conboy's grand jury transcript which were released by the January 25, 1980 disclosure order.

B. Contrary To The Fifth Circuit's Mistaken Belief, The Disclosure Order Released The Grand Jury Transcripts To Both Class and Opt-Out Plaintiffs

Respondents do not dispute[2] that, as previously demonstrated by petitioners (Petition at 17-20), the district court's disclosure order released the grand jury transcripts to not only class plaintiffs, but also the opt-out plaintiffs in the *Corrugated Container* litigation, M.D.L. 310. Furthermore, opt-out plaintiffs in *Pillsbury v. Conboy* admit that the January 25, 1980 disclosure order released the same grand jury transcripts to both the class and opt-out plaintiffs:

> In January, 1980, Judge Singleton . . . ordered that portions of the immunized government interview statements and Grand Jury testimony of certain witnesses be produced to attorneys *for the class and opt-outs.* (Emphasis added.)

Brief For The Petitioners, *Pillsbury v. Conboy*, No. 81-825, at 4.

Thus, as demonstrated by petitioners, admitted by opt-out plaintiffs and now undisputed by respondent class plaintiffs, the Fifth Circuit's denial of appellate review was based upon an erroneous premise that the grand jury transcripts had already been used to the fullest extent possible. To the contrary, the opt-out plaintiffs are in possession of the same grand jury transcripts

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[2] Opposition Brief at 13-14.

released to class plaintiffs, have used those transcripts, continue to use them, and are free to use them at trial. Indeed, in *Pillsbury v. Conboy*, opt-out plaintiffs seek to use Conboy's grand jury transcript in his deposition.

C. The Opt-Out Plaintiffs Are Free To Continue To Use The Improperly Released Grand Jury Transcripts

Unable to dispute that the grand jury transcripts were released to the opt-opt plaintiffs as well as the class plaintiffs, respondents assert that the Fifth Circuit's decision "will require the opt-out plaintiffs to return the transcripts as well." (Opposition Brief at 13). This contention is flatly wrong. Pretrial Order No. 66 (attached hereto), which was recently filed by the district court on March 22, 1982, requires only that the *class* plaintiffs return the grand jury transcripts in their possession. It does not require the *opt-out* plaintiffs to return the same grand jury transcripts which were also released to them under the district court's January 25, 1980 order and which are still in their possession. Pretrial Order No. 66 provides, in pertinent part:

> Defendants' motion for return of grand jury transcripts is GRANTED as to the *class plaintiffs* in this litigation. As directed by the United States Court of Appeals for the Fifth Circuit in their opinion, *In re Corrugated Container Grand Jury*, 659 F.2d 1330 (1981), the order of January 25, 1980 by the district court releasing grand jury transcripts to the civil class action plaintiffs is vacated. The *class plaintiffs* are hereby directed to return all those transcripts (and copies made thereof) released to them by the order of January 25, 1980 to Lawrence Gustafson of the Department of Justice, Antitrust Division, Dallas Office, on or before May 3, 1982. (Emphasis added.)

Although Pretrial Order No. 66 set a trial date of September 7, 1982 for the opt-out cases, it did not restrict in any way the use of the grand jury transcripts by the opt-out plaintiffs at trial.

D. The Issue Of The Improper Disclosure Of The Grand Jury Transcripts Is Not Moot

Petitioners have a legitimate and continuing interest in preventing further use of the improperly disclosed grand jury transcripts and in limiting the damage already done.[3] Although the district court's January 25, 1980 order released the grand jury transcripts to both the class and opt-out plaintiffs, Pretrial Order No. 66 requires only the class plaintiffs to return the transcripts. Petitioners have not obtained the relief to which they would be entitled under a decision on the merits in either the class or opt-out cases. If petitioners were permitted to be heard and prevailed on the merits, it would be appropriate for the Fifth Circuit to remand the matter to the district court to enter an order directing the opt-out plaintiffs, as well as the class plaintiffs, to return the grand jury transcripts; sealing all public records created as a result of the disclosure of the transcripts to both the opt-out and class plaintiffs; and barring any further dissemination and use of the transcripts, including their use in preparing for and at a retrial, if any, in the civil class cases, as well as in preparing for and at the recently scheduled trial in the opt-out cases.

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[3] In the class cases, Mead is the only defendant which did not settle. Although an adverse jury verdict was returned, no judgment has yet been entered against Mead, and none will be for many months. Class plaintiffs admit that they would seek to use the transcripts in the "event of a retrial of the case." (Opposition Brief at 11).

While Mead recently settled with the opt-out plaintiffs, other defendants have not. A trial date was recently scheduled. The transcripts in the possession of the opt-out plaintiffs include the grand jury testimony of fourteen Mead employees as well as the transcripts of other witnesses who referred to Mead in their testimony.

Of course, the forty-one petitioner grand jury witnesses have a continuing interest in preventing further use of the improperly released grand jury transcripts in both the class and opt-out cases.

Respondents quote statements by petitioners in their previous applications for a stay to the effect that the denial of a stay would moot the secrecy of the grand jury (Opposition Brief at 6-8). These statements said nothing more than that once the secrecy of the grand jury is breached by the release of the transcripts, the harm done by the disclosure to witnesses, defendants, unindicted individuals and to the institution of the grand jury itself, could never be fully remedied. While the secrecy of the grand jury is necessarily breached once transcripts are released, the issue of improper disclosure, as recognized by the Fifth Circuit, is not moot so long as the transcripts are susceptible to further dissemination and continued use. The Fifth Circuit, however, held the appeal moot because it erroneously believed that "there is no further use to which these transcripts may be put under the order of the district court." *In re Corrugated Container Grand Jury*, 659 F.2d 1330, 1332 (5th Cir. 1981). But, as admitted by respondent class plaintiffs and by the opt-out plaintiffs, as found by the Seventh [4] and District of Columbia [5] Circuits, and as previously demonstrated by petitioners (Petition at 17-20), the grand jury transcripts were released to both the class and opt-out plaintiffs. The *opt-out* plaintiffs are free to continue to use the same grand jury transcripts in pretrial discovery and trial preparation, and will have an opportunity to use them at trial.

Finally, if disclosure and use of the transcripts were the only issue, there would never be appellate review of a grand jury disclosure order where no stay had been entered, since disclosure and use would occur prior to the time an appellate court could hear the issue. The result would undermine this Court's decisions in *Douglas Oil* and *Procter & Gamble*.

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[4] *In re Corrugated Container Antitrust Litigation, Appeal of Conboy*, 661 F.2d 1145, 1147 & 1147-48 n.2 (7th Cir. 1981) (en banc), *cert. granted sub nom. Pillsbury Co. v. Conboy*, 50 U.S.L.W. 3547 (U.S. Jan. 11, 1982) (No. 81-825).

[5] *In re Corrugated Container Antitrust Litigation, Appeal of Culy*, 662 F.2d 875, 878 & 888 n.29 (D.C. Cir. 1981).

II. THE DISTRICT COURT'S UTTER DISREGARD OF THE PROPER STANDARDS FOR THE DISCLOSURE OF GRAND JURY TRANSCRIPTS PROVIDES A COMPELLING REASON TO GRANT THE WRIT

While respondents make several general statements to the effect that the district court "did not disregard the applicable law" (Opposition Brief at 18), it is significant that respondents do not deny, as previously demonstrated by petitioners, that:

1. The district court made no findings that any of the 135 grand jury transcripts were needed to impeach a witness, to refresh his recollection, or to test his credibility (Petition at 25);

2. The district court did not review, *in camera*, any of the 135 transcripts to determine what need, if any, there was for their disclosure (Petition at 25);

3. The district court failed to consider the need to protect the unindicted and innocent witnesses from disclosure of accusations made against them before the grand jury (Petition at 24);

4. The district court failed to consider the impact of a breach of grand jury secrecy on the future functioning of grand juries (Petition at 17, 25);

5. The district court did not make any prior determination that any of the witnesses had asserted the Fifth Amendment (Petition at 16-17); and

6. The district court made no evaluation of actual discovery already obtained by plaintiffs (Petition at 17).

The district court's blatant failure to abide by *Douglas Oil* and *Procter & Gamble* is particularly egregious here since it involved the wholesale disclosure of the transcripts of 135 grand jury witnesses.[6]

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[6] While respondents claim that there was wholesale invocation of the Fifth Amendment (Opposition Brief at 19), the district court did not attempt to make any correlation between the assertion of the Fifth Amendment by any particular witness and the disclosure of a particular transcript. For example, at the time of the disclosure order, no Mead employee had asserted the Fifth Amendment in a deposition.

III. THE DISTRICT COURT'S DISCLOSURE ORDER IS APPEALABLE

Respondents' argument that the district court's grand jury disclosure order is not appealable is a transparent attempt to raise a question of jurisdiction where none exists. Jurisdiction to review the district court's disclosure order compelling the Department of Justice, a non-party, to produce 135 grand jury transcripts lies under 28 U.S.C. § 1291 and the rationale of this Court's decision in *Perlman v. United States*, 247 U.S. 7 (1918), which respondents completely ignore. Where, as here, the parties aggrieved by a grand jury disclosure order have no control over the grand jury transcripts and are powerless to resist the order, or to be held in contempt, an appeal is available from the disclosure order. *Perlman v. United States*, 247 U.S. 7, 12-13 (1918); *United States v. Ryan*, 402 U.S. 530, 533 (1971).

In *Perlman*, the documents sought by the Government were not in Perlman's possession. Like Perlman, petitioners did not have physical custody of the grand jury transcripts and lacked the opportunity to stand in contempt of the district court's order and refuse to produce their transcripts. In the words of this Court, petitioners were "powerless to avert the mischief of the order." *Perlman v. United States*, 247 U.S. at 13.

Thus, immediate appellate review is available to petitioners of the grand jury disclosure order. Moreover, the forty-one petitioner grand jury witnesses were not defendants in the civil cases and, thus, can only seek review of the disclosure order on this appeal. There is no later time for them to attempt to seek review.

IV. CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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Appendix

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

M.D.L. 310

IN RE CORRUGATED CONTAINER ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO ALL CASES

PRETRIAL ORDER NO. 66

A pretrial conference was held on March 3, 1982, and the court having considered the memoranda and arguments of Counsel makes the following orders:

1. In regard to opt-out plaintiffs' motion for sanctions against Container Corporation of America (C.C.A.), this Court GRANTS plaintiffs the opportunity to retake those depositions necessary since the production of documents by C.C.A., but DENIES costs for plaintiffs.

2. Defendants' motion for return of grand jury transcripts is GRANTED as to the class plaintiffs in this litigation. As directed by the United States Court of Appeals for the Fifth Circuit in their opinion, *In re Corrugated Container Grand Jury*, 659 F.2d 1330 (1981), the Order of January 25, 1980 by the district court releasing grand jury transcripts to the civil class action plaintiffs is vacated. The class plaintiffs are hereby directed to return all those transcripts (and copies made thereof)

released to them by the Order of January 25, 1980 to Lawrence Gustafson of the Department of Justice, Antitrust Division, Dallas Office, on or before May 3, 1982.

3. Willamette Industries, Inc.'s and opt-out plaintiffs' motions for summary judgment are hereby DEFERRED at this time.

4. Since obtaining new information from the State of Washington concerning the issue of agency, Georgia-Pacific Corporation is permitted to re-submit its motion for summary judgment against Northwest Wholesale, Inc. and Wenoka Supply Co. by April 15, 1982.

5. Counsel are to work together to determine the scope and timing of expert depositions. Counsel for plaintiffs and counsel for defendants are to select two representatives each to meet with the Court to discuss the consensus of the parties as to whether this shall be a bench or a jury trial.

Further, at this meeting, the representatives shall discuss and determine procedures to be utilized by the court in the trial of these cases and choose a date in advance of trial for the preparation and filing of a joint pretrial order which by the practice of this Court in accordance with the local rules includes the list of documents to be introduced into evidence. There shall be two lists of documents to consider:

1. documents to which no objection is to be made;

2. documents to which the parties propose to object.

It is the Court's desire to rule on objections to document admission before the trial. At the pretrial conference to be scheduled close to trial, it shall also be necessary to discuss the witnesses to be called by each side, the number of witnesses and all related pretrial matters.

6. Regarding the matter of consolidation and venue, this Court has weighed the considerations of all the parties

in the 19 cases remaining before the Court. Under 28 U.S.C. § 1407(a) on multidistrict litigation, the judicial panel on multidistrict litigation is to remand each action to the transferor court unless it shall have been previously terminated.

Several parties have requested a change of venue under 28 U.S.C. § 1404(a) which states: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." These parties request that the remaining cases be consolidated and transferred to this Court in the Southern District of Texas rather than individually remanded to the transferor courts.

The issues in this litigation are substantially common to all the cases. Consolidation would continue the efficiency of centralized management past completion of the pretrial proceedings. By permitting a trial of common issues, the resources and expertise of the parties can be pooled for more vigorous prosecution of the disputed issues of law and fact, but with substantial time and cost savings to all parties.

Transfer of all related cases to one district court results in a significant savings in judicial manpower, as well, by eliminating the duplication of effort inherent in simultaneous consideration of identical problems by several district court judges. The man-hours thus conserved reduce docket congestion in the transferor courts. Efficiency shall be promoted by having the same court conduct both pretrial proceedings and the trial.

Based on the expertise acquired by this Court through the trials of the criminal and civil class actions, and its familiarity with the cases herein comprised of plaintiffs who opted-out of the class action, it is well advised to keep these cases rather than permit them to be returned to transferor judges unfamiliar with the cases. The interest

of justice is better served by a court that is fully informed of the matters before it and better able to discern the precise nature of the issues presented.

Therefore, for the convenience of the parties and witnesses and in the interest of justice, all the opt-out cases in this litigation are hereby consolidated and then transferred to the Southern District of Texas, pursuant to 28 U.S.C. § 1404(a).

Additionally, this trial shall be bifurcated between the determinations of liability and damages to alleviate problems of confusion inherent in such complex litigation. The trial on liability shall concern the issues of conspiracy, affirmative acts of fraudulent concealment, fact of impact, and percentage of overcharge, if any. The amount of overcharge and the period for which it applies shall be determined in a separate proceeding.

7. A trial date of September 7, 1982 is hereby set for the consolidated opt-out action in this litigation.

DONE this 22nd day of March, 1982 at Houston, Texas.

/s/ John V. Singleton
United States District Judge